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No. 91-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conduct of a municipally-owned cable television system, as a market participant, is entirely immune from antitrust scrutiny.

2. Whether it is consistent with the Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 32 (1985), to ascribe an intent to the Arkansas Legislature to permit cities to silence First Amendment speakers, privately-owned cable operators, through anticompetitive marketplace conduct where the legislature only passed a statute authorizing municipal entry.

3. Whether it is consistent with the Supreme Court's decisions on constitutional waivers to conclude without a trial that a municipality obtains a valid First Amendment waiver from a cable operator when the operator signs a franchise with the city.

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff in the district court and appellant in the court of appeals, is Paragould Cablevision, Inc.* Respondents, the defendants in the district court and appellees in the court of appeals, are the City of Paragould, the Paragould Light and Water Commission, Charles Partlow, Don Perkey, Douglas J. Smith, Tim Wooldridge, Ben Branch, Phyllis Dees, Jay W. Dortch, Frank Gatlin, James Inness, George Cook, Jeptha Futrell, Jerry Jetton, William Brewer, and Mack Shotts.

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* Paragould Cablevision, Inc. is an indirect subsidiary of Cablevision Systems Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Paragould Cablevision, Inc. ("Cablevision") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is reported at 930 F.2d 1310. The opinion of the district court in this case (App. 10a-27a) is reported at 739 F. Supp. 1314.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1991 (App. 1a). A petition for rehearing was denied on June 18, 1991 (App. 28a). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act states in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several states, . . . shall be deemed guilty of a felony . . .

15 U.S.C. § 2 (1991).

The Local Government Antitrust Act of 1984 states in pertinent parts:

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 35(a) (1991), and

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 36(a) (1991).

Section 1 of Arkansas' Act 328 of 1987 states in pertinent parts:

> (a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

Ark. Stat. Ann. § 14-199-601 (Supp. 1989), Addendum 25, and

> The city or town may erect, construct, operate, repair and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy-wires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal system.

Ark. Stat. Ann. § 14-199-602 (Supp. 1989), Addendum 25.

STATEMENT

Paragould Cablevision, Inc. ("Cablevision") has been providing cable television services in Paragould, Arkansas ("the City") since 1963. Until just recently, Cablevision's system served over 6,300 subscribers. Cablevision's service features 50 channels of programming which include news and public affairs networks such as CNN and C-SPAN. Its current Franchise Agreement with the City runs from December 10, 1983 to December 9, 1993 with provisions for two five-year extensions. A rival cable television system operated by the City became operational in March, 1991. This case involves the question of whether the municipally-owned cable system may engage, as it is currently doing, in whatever anticompetitive, predatory, and coercive activities it desires, without the constraint of the antitrust laws, until it has succeeded in

running its competitor out of business. If the court of appeals' opinion stands, all antitrust claims against the municipal system would be barred, no matter how egregious the conduct.

Paragould's Entry into the Paragould Cable Television Market

In 1986, the voters of the City approved an ordinance authorizing the municipally-owned light and water utility, Paragould Light and Water Commission ("CLW"), to construct and operate a municipally-owned cable television system in Paragould as a direct competitor of Cablevision and its already established system. CLW controls and operates the utility poles to which both cable systems must attach in order to become operational.

In June 1988, the City adopted an ordinance authorizing CLW to acquire, construct and operate a cable television system and entered into a franchise agreement with CLW. On October 31, 1989, less than 35% of the City's registered voters, in an election vote, by a margin of 1,549 to 1,102, authorized the issuance of general obligation Capital Improvement Bonds by the City, of up to $3.2 million, for the purpose of financing the cost of acquiring, constructing and operating a cable television system.

Pursuant to that authorization, on January 22, 1990, the City enacted a bond ordinance authorizing the sale of general obligation bonds for the financing of the cable system. The bonds are secured by pledges of revenues derived from the system and, if necessary, by increases in taxes for all citizens in Paragould from a 2.1 mill ad valorem tax to 6.5 mill. In other words, the bonds are backed by the taxing powers and real estate taxes of the City.

From the outset, the City has flexed its taxing authority muscle in its efforts to persuade the voters to support a municipally-owned system, and ultimately to convert subscribers from Cablevision's system to its own. In par-

ticular, the City incorporated into its campaign advertising, the threat of a tax increase in the event that the City owned system was not able to garner at least 60% of Paragould's cable market. That point has been reiterated in interviews with City officials appearing in local newspapers. In fact, the publicly announced plans and financial projections of the municipal system are based upon assumptions that require CLW to capture the vast bulk of the Paragould cable television market.

Since beginning its operations in March, 1991 as City Cable, the City is rapidly advancing towards its goal of market dominance and monopolization. At the end of six months in operation, it had already signed over 2,000 customers. Since the city-owned system began, subscriptions for the Cablevision system have dropped to about 5000.

Cablevision's Lawsuit Against the City and CLW

In January, 1989, Cablevision filed a complaint against the City and CLW alleging certain antitrust violations and violations of Cablevision's rights under the First and Fourteenth Amendments. The crux of Cablevision's antitrust claim was that CLW was improperly utilizing its monopoly power in the electricity market to leverage itself into a monopoly position in the cable television market through cross-subsidization, predatory pricing, and other anticompetitive acts. Specifically, Cablevision asserted that "CLW's power to control the use of the [utility] poles, its monopoly power held in the provision of electric service, its new status as a direct competitor with Paragould Cablevision, and its announced intent to proceed with the construction and operation of a cable television system results in a dangerous probability of success in excluding competition from, and monopolizing, the relevant market" (Complaint ¶ 31). Cablevision further alleged that the "City's restriction on Paragould Cablevision's right to sell and transmit advertising on its cable system and its decision not to impose the same re-

striction on CLW impermissibly favors the rights of certain speakers over others in violation of the First and Fourteenth Amendments of the United States Constitution" (*Id.* ¶ 39).

The City and CLW moved to dismiss the Complaint in its entirety. The district court dismissed Cablevision's antitrust claims with prejudice, concluding that the general state statutes related to cable television, forever immunize CLW and the City from any and all anticompetitive acts, including those complained of by Cablevision. The district court also dismissed with prejudice Cablevision's constitutional claims, holding that the City's restriction on advertising by Cablevision did not amount to a regulation of speech.

On appeal, Cablevision argued that the district court's decision on the antitrust count was erroneous because it immunized the City and CLW from federal antitrust liability for all time and for all anticompetitive actions, including the most egregious predatory conduct. Cablevision urged that the district court painted much too broad a brush of the legislature's intent, since there was no evidence in the statutory language or legislative history that the legislature intended that municipalities be given carte blanche to eradicate competition from private competitors in the cable television market. Cablevision further contended that the district court misapplied the standard of review for motions to dismiss with respect to Cablevision's First and Fourteenth Amendment claims since it based its conclusion that speech was not implicated on an independent finding of fact.

The court of appeals affirmed the district court's decision, concluding that the statutory authority in Arkansas was broad enough to include the displacement and absolute elimination by municipalities who participate as cable operators in the cable television market of their private competitors from the market. To reach this conclusion, the court of appeals declared:

> Municipalities generally enjoy access to extant governmental infrastructure such as utility poles and rights of way. When a municipality, such as Paragould or its entity, the CLW, enters into the cable market, it necessarily will benefit from this access . . . . Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies.

(App. 6a).

With respect to Cablevision's First Amendment claims, the court of appeals acknowledged that Cablevision's claims were valid. The court of appeals nevertheless dismissed those claims on an independent finding that Cablevision had waived its free speech rights when it signed the initial franchise agreement. Given that the waiver claim was a creature of the court's own making, neither party ever had the opportunity to present arguments on the issue. Notwithstanding that fact, the court concluded:

> By entering into the franchise agreement . . . Cablevision effectively bargained away some of its free speech rights. Cablevision could have bargained for an unqualified right to solicit and transmit advertisements. No law mandated otherwise. Cablevision simply failed to protect its commercial rights. Presumably Cablevision received consideration in return for this sacrifice, but apparently what was once considered a satisfactory bargain has turned into a sour deal. Regardless, Cablevision cannot now invoke the first amendment to recapture surrendered rights.[1]

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[1] (App. 8a). Cablevision's petition for rehearing asked the court of appeals to reverse the district court's dismissal of Cablevision's antitrust and First Amendment claims and to remand the case for the development of a record on all relevant issues, including the waiver defense, especially given that the latter point had never been factually addressed by either party. The petition for rehearing was denied on June 18, 1991.

REASONS FOR GRANTING THE PETITION

This case merits plenary review because it raises important and recurring questions regarding the contours of the antitrust exemption to municipally-owned commercial enterprises and regarding the standards for waivers of First Amendment rights in franchising contexts.

There are three reasons for granting the petition.

First, this Court has recently stated that when a state or municipality "acts as a commercial participant in a given market," antitrust "immunity does not necessarily obtain . . ." *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S. Ct. 1344, 1351 (1991). The court of appeals declined to factor this fundamental distinction into its analysis, characterizing it as "merely a suggestion" and "not a rule of law" (App. 4a). There is no basis to permit a full-fledged marketplace competitor, even if municipally-owned, to operate outside the rules that govern economic competition found in the Sherman Act.

Second, the court of appeals incorrectly applied the basic standard for municipal immunity set forth in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and ascribed to the Arkansas Legislature, without foundation, an intent to permit cities to silence First Amendment speakers through anticompetitive means when all the legislature did was authorize municipal entry into cable.

Cablevision was permitted no discovery, nor was allowed to create any factual record in the district court. Yet the court of appeals' opinion was impermissibly grounded on a factual finding—that the cable industry has "monopolistic tendencies." For many reasons, that question cannot be decided without a record. Further, Cablevision submits that such a record would show the pattern of renegade behavior by the municipally-owned system beyond anything the legislature "authorized."

Third, the court of appeals clearly erred when, with no record before it, it held that Cablevision had waived its First Amendment right to engage in commercial speech when it signed its municipal franchise. The court of appeals never applied the standards of constitutional waivers developed by this Court. The thrust of the court of appeals' decision is that a local government, in exchange for a franchise grant, is free to extract the entirety of the First Amendment rights recognized by this Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

The effects of this decision go well beyond the facts and controversy in Paragould, Arkansas. There are an increasing number of communities (at last count approaching 100) with privately-owned cable systems where local governments are considering building rival municipal cable systems. If the court of appeals' decision is not reviewed, it becomes precedent to permit any municipality to run out a private cable speaker by whatever anticompetitive means it chooses, so long as it is authorized under state law to operate a system. If the court's decision stands, any municipality can extract a "waiver" of First Amendment rights in the franchising process, a task made easier by the threat of predatory municipal competition. A municipality, under the logic of the court of appeals' decision, could require a cable operator in the franchising process to forego its First Amendment status recognized by the Supreme Court, including *inter alia*, its press role of reporting on municipal governmental affairs.

The end result of such a decision will be communities with no local speaker, but only a government-owned electronic press. This is a particularly chilling result in the thousands of communities like Paragould with no truly local over-the-air broadcast station licensed to the community.

I. A MUNICIPALLY-OWNED COMMERCIAL PARTICIPANT'S MARKETPLACE CONDUCT SHOULD BE SUBJECT TO THE ANTITRUST LAWS.

This case presents the situation of whether the conduct of a municipally-owned market participant should be subject to the same rules of competitive behavior as all of its competitors. Cablevision's antitrust complaint challenges not the regulatory acts of a government, but marketplace conduct of a commercial enterprise providing a nonessential service unrelated to public health and safety. The court of appeals decided that these factors did not affect the question of antitrust immunity under this Court's decisions. That conclusion is incorrect and should be set aside by this Court.

Municipalities, unlike states, are not automatically exempt from the federal antitrust laws. *See, e.g., Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 49-50 (1982). Anticompetitive activity by a municipality is only excused from antitrust liability when the challenged conduct is "pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (plurality opinion). To qualify as exempt, the "state policy" relied upon must derive from a "clearly articulated and affirmatively expressed state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985).

This Court has emphasized that courts must take a discerning approach to assess municipal antitrust immunity. The Court has therefore indicated that while a municipality need not point to a specific, detailed legislative authorization to assert a successful immunity defense, the determination of whether such an exemption applies is not a "purely formalistic inquiry; the State may not validate a municipality's anticompetitive conduct simply by declaring

it to be lawful." *Town of Hallie*, 471 U.S. at 39. Rather, it must be apparent "that the legislature contemplated the kind of action complained of" when it granted authority to operate in a particular area. *See id.* at 44, *citing City of Lafayette*, 435 U.S. at 415.

Hence, for example, in *Community Communications Company, Inc. v. City of Boulder*, 455 U.S. 40 (1982), the Court found that Colorado's Home Rule Amendment to its Constitution, conferring on municipal governments general authority to govern local affairs, did not constitute a "clear articulation" of state policy to authorize anticompetitive conduct with respect to the regulation of cable television. In so holding, the Court noted that "the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Id.* at 55 (emphasis in original).

Congress has similarly recognized the importance of subjecting municipalities to antitrust scrutiny. In passing the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1991), which immunizes municipalities from treble damage suits, Congress declined to exempt local governments altogether from the antitrust laws. It did so in large part because of its recognition that local governments involved in business enterprises may engage in anticompetitive activity which fails to serve any legitimate public purpose.[2]

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[2] *See* H.R. Rep. No. 965, 98th Cong., 2d Sess., at 12-13 (1984) (noting that any legislative solution should weigh the chilling effect of potential or actual antitrust litigation on local governments and their officials against the need to preserve some right of redress for private persons harmed by anticompetitive conduct); *Id.* at 25 (statement of Rep. Jack Brooks) (noting that the bill, by providing for injunctive relief, recognizes that there is a role for the antitrust regulation of local governments to ensure proper competition in local markets); 130 Cong. Rec. H8474 (daily ed. Aug. 6, 1984) (statement of Rep. Peter Rodino) (observing that local governments

In last term's *City of Columbia* decision, the Court found that a city's zoning restrictions regarding billboard construction were immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943). At issue were official decisions of governmental bodies. In rejecting the Fourth Circuit's holding, based upon language in *Parker*, that antitrust immunity would not apply where the official decision represented an act pursuant to a conspiracy with a private party, this Court indicated that the state action immunity derived from the basic national commitment to federalism and that therefore ". . . the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." 111 S. Ct. at 1351.

In contrast, however, an entirely different situation is presented when the action under scrutiny is not governmental conduct by a sovereign, but commercial conduct by a government-owned entity. As the Court pointed out twice in *City of Columbia*:

> [antitrust] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.

Id.

* * * *

> We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'

111 S.Ct. at 1353 (citations omitted).

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are increasingly engaged in commercial and business activity and that they are in a position to undercut the national policy favoring competition even when such action serves no legitimate government purpose). *See also* P. Areeda & H. Hovenkamp, Antitrust Law, ¶ 212.2, at 124 (Supp. 1989) (antitrust scrutiny of municipal actions is justified where damages are unavailable).

The court of appeals had the teachings of *City of Columbia* before it when it reached the instant decision. Instead of applying those insights to the purpose and limits of the state action immunity, the court of appeals pronounced them as "dicta" and "suggestions" and declined to utilize them until they are transformed into a rule of law (App. 3a-4a.).

The court of appeals' failure to recognize the distinctions identified in *City of Columbia* was wrong. The court then compounded its mistake in its wooden application of the basic standards found in *Town of Hallie.*

The touchstone of the antitrust laws is consumer welfare. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Consumer welfare may be as adversely affected by predatory and anticompetitive conduct of a government-owned enterprise as by one owned by an individual or public shareholders. No principle of federalism is undermined, moreover, by requiring government-owned market participants to comply with the same competitive safeguards as its competitors.

Such a conclusion is consistent with the consensus of courts facing the issue that nonprofit entities in general are not entitled to antitrust immunity, *e.g.*, *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984), and that nonprofit entities are equally prone to anticompetitive behavior as profit-making enterprises. *See, e.g., FTC v. University Health, Inc.*, 1991-1 Trade Cas. ¶ 69,424 (11th Cir. 1991); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.) *cert. denied*, 111 S. Ct. 295 (1990); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986).

As was recognized in *City of Lafayette*:

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws . . . we are especially

> unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 412-13.

The Court further emphasized that

> [i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

Id. at 408.

This Court should expound as a rule of law that municipal enterprises that are acting solely as a market participant enjoy no antitrust immunity, reverse the court of appeals, and reinstate Cablevision's complaint.

II. IN AUTHORIZING MUNICIPALITIES TO ENTER THE CABLE MARKET THE ARKANSAS LEGISLATURE DID NOT AUTHORIZE IT TO ENGAGE IN CONDUCT VIOLATIVE OF THE SHERMAN ACT.

Cablevision does not contend that the decision of the City and CLW to enter the cable television business violates the antitrust laws. Cablevision does contend that the methods chosen, and the intent of the City and CLW to destroy any competition in the cable television business in Paragould, states an antitrust claim because the conduct Cablevision challenges is *not* a necessary and reasonable consequence of defendants engaging in the cable television business, the "authorized activity" by the State of Arkansas. The court of appeals hinged its decision on a factual finding on the nature of the industry in question, a finding which we vigorously dispute both procedurally because of the lack of any record and on the merits. Moreover, in deciding that the City's conduct was exempt, the court of appeals also completely failed to consider that First Amendment speakers are at issue and, without

foundation, ascribed to the Arkansas Legislature an intent to permit cities to silence such speakers through anticompetitive means.

A. The Relevant Statutes Do Not Contemplate the Anticompetitive Conduct Complained of by Cablevision.

In reaching its conclusion, the court of appeals relied on two Arkansas statutory schemes relating to cable television. Section 1 of Act 328 of 1987, Ark Stat. Ann. § 14-199-601 (Supp. 1989), Addendum 25, expressly authorizes the City of Paragould to own, construct, and operate a cable television system.[3] Act 871 of 1985, Ark. Stat. Ann. § 14-164-301 *et seq.* (1987 & Supp. 1989), Addendum 21-24, generally authorizes municipalities to issue general obligation Capital Improvement Bonds to finance the acquisition, construction, and operation of cable television systems, Ark. Stat. Ann. § 14-164-303, subject to the passage of an authorizing ordinance and approval by the electorate. Ark. Stat. Ann. §§ 14-164-303, 309, Addendum 21-24.

There is no reason to believe that Arkansas, in authorizing municipalities to construct and operate cable systems, intended to quell all competition or permit municipal

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[3] The statute provides that:

> (a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

Ark. Stat. Ann. § 14-199-602 (Supp. 1989), Addendum 25, states that:

> The city or town may erect, construct, operate, repair and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy-wires, stubs, anchors, towers, antennas, pipes,

systems to engage in anticompetitive acts. The statute at issue in this case *does not allow* the City *to place limitations* on competitors; it merely allows it to *become* a competitor. Furthermore, it is noteworthy that in the same 1987 session that the Arkansas legislature passed legislation that permitted municipalities to operate a cable system, it failed to pass another bill that would have authorized cities to exercise the power of eminent domain for the purpose of acquiring cable television systems in order to convert them to publicly owned and operated systems."[4] If the latter legislation had passed, it may have been appropriate to ascribe to the Arkansas legislature the expectation that private competition was to be quashed. The fact that it did not, however, suggests that the court of appeals is mistaken and has read far too much into Act 328, which simply authorizes market entry by municipalities, not municipal monopolies.

B. The Monopoly Leveraging Conduct Alleged by Cablevision Was Not Contemplated By These Statutes.

Cablevision's complaint alleged that the City and CLW had and were planning to engage in monopoly leveraging conduct. Monopoly leveraging has been widely recognized as a valid antitrust claim.[5]

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connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal system.

[4] Senate Bill 434, State of Arkansas, 76th General Assembly, Regular Session 1987, By: Senator Malone. Senator Malone also introduced Act 328.

[5] *See, e.g., Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087, 109 S. Ct. 2461 (1989). *See also Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *SmithKLINE Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978), *cert. denied*, 439 U.S. 838 (1978).

Cablevision alleged, among other things, that the City and CLW were using their leveraging power to drive it out of business.[6] Under the present scheme, the City has a strong incentive to use its leveraging power for this purpose, in light of the fact that unless prospective subscribers support the city-owned cable system, their property taxes will triple from 2.1 mill to 6.5.[7]

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[6] Cablevision's belief is soundly based. Even though the costs of operating the cable system should be borne by the system and its subscribers, we believe that CLW is cross-subsidizing its cable system. Despite CLW's assertion in the court of appeals that cross-subsidization will not occur, it is widely acknowledged that there is no facile solution—cross-subsidization is easy to accomplish and difficult both to detect and monitor. *See, e.g., United States v. Western Electric Co.*, 673 F. Supp. 525, 573 (D.D.C. 1987), *aff'd* [*rev'd*] *on other grounds*, 900 F.2d 283 (D.C. Cir. 1990) (noting that "cross-subsidization is easy to achieve by firms engaged in both regulated and unregulated business but difficult to detect"). The federal ban on telephone company ownership of cable services within the company's service area, *See* 47 U.S.C. § 533(b), 47 C.F.R. §§ 63.54-63.58, reflects an understanding that telephone companies have the means and the incentive to engage in anticompetitive conduct and the potential to cross-subsidize. *See* Final Report and Order, *In the Matter of Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated CATV Systems*, 21 FCC 2d 307, 324-330 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). In this instance, CLW personnel and equipment are being used by the City cable company, and, among other things, we believe that CLW employees not otherwise in cable have been dragooned into taking the cable service themselves and selling it to others by threats of reductions of their employee benefits. The court of appeals' decision, however, immunizes this otherwise improper conduct from the antitrust laws and would allow such conduct to occur unchecked, since there is no state-level supervision of municipally-owned utilities. Ark. Code Ann. § 23-4-201 (1989).

[7] Cablevision believes that if it were permitted to develop a record in this case, it could demonstrate that CLW is currently engaging in cross-subsidization and below cost pricing, and is expressly attempting to utilize its monopoly control over electric service to coerce subscriptions to its cable service. The city has a strong incentive to cross-subsidize in order to avoid raising property taxes.

Nowhere in the cited statutes is there any express authorization to exclude private competition in local cable television markets through this kind of monopoly leveraging or predatory conduct.[8] As the plurality stated in *City of Lafayette*, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." 435 U.S. at 417; *see Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-82, 390-91 & n.7 (1973) (Stewart, J., concurring in part and dissenting in part).[9]

The best that can be said about the court of appeals decision is that it is based upon an improper finding that "the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies." (App. 6a.). *First*, there is no record in this case to support such an assumption—there is no record in this case at all. To the con-

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[8] *See Parks v. Watson*, 716 F.2d 646, 663-64 (9th Cir. 1983) (finding no immunity where nothing in the statute authorizing public ownership of geothermal resources allowed the court to infer that any authorization by the state to displace competition with city-run geothermal districts may also have included authorization for the city to undertake anticompetitive actions).

[9] It is hard to believe that the Arkansas legislature contemplated that City Cable representatives would

—take the municipal voting list to repeatedly call those who voted in the authorization election to insist that they were "obligated" to subscribe to the City Cable system;

—inform retired municipal employees that pension payments might be "lost" if they do not subscribe to the City Cable system;

—imply to residents of a public senior citizen home that they have an "obligation" to subscribe to the City Cable system; and

—tell churchgoers who utilize the adjacent CLW parking lot on Sunday that such use requires them to subscribe to the City Cable system.

All of this, Cablevision believes, has occurred in Paragould.

trary, Cablevision wants to compete and believes it can compete if the municipal system is subject to basic competitive rules.[10] Certainly the court of appeals had no basis to make what is a factual finding to that effect. *Second*, in contrast to the carte blanche accorded municipalities by the court of appeals, Congress has directed in the Cable Communications Policy Act of 1984 that cable systems are entitled to significant protections against the unfair and arbitrary renewal actions previously practiced by franchising authorities.[11] Local political officials can evade these safeguards by threatening to overbuild or by overbuilding and thus accomplishing indirectly what federal law prohibits them from doing directly. *Third*, the Federal Communications Commission, charged with supervisory policy authority over cable television, has articulated a strong policy preference for the grant of more franchises for additional cable speakers, rather than monopoly speakers, whether private or governmental.[12]

In light of those factors, the Court should reject the linchpin of the court of appeals' decision and instead hold that legislation authorizing entry, standing alone, does not constitute state policy to displace competition. At the

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[10] From Cablevision's vantage point, the municipal system is prepared to engage in all types of outlaw behavior until brought to task by third parties. In building its system, CLW engaged in improper and dangerous construction techniques, causing physical damage to the plant, ignoring Cablevision's protests, until the local telephone company also protested. It engaged in improper installation processes until the FCC intervened. But under the court of appeals' decision, there will be no constable on the beat protecting against anticompetitive conduct.

[11] *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 546 (1991). *See also* H.R. Rep. No. 934, 98th Cong., 2d Sess., at 72 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 4655, 4709.

[12] *See In the Matter of Competition, Rate Deregulation and the Commission's Policies to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (July 31, 1990).

very least, a ruling that an entry statute constitutes state authorization requires a record that competition in the market was infeasible, and this case requires reversal for the development and trial of this issue. *See Preferred, supra.*

C. The Court of Appeals' Conclusion Regarding the Legislative Intent is Particularly Unfounded in Light of the First Amendment Status of Cable Operators.

The court of appeals concluded that conduct otherwise violative of the antitrust laws, monopoly leveraging, was a "necessary and reasonable consequence of engaging in the authorized activity." In so doing, the Court ignored an important, distinguishing element about the "market" in question—that it is comprised of First Amendment speakers. There is no dispute that cable operators are First Amendment speakers because they originate, select and disseminate news, information and entertainment. *See, e.g., Leathers v. Medlock*, —— U.S. ——, 111 S. Ct. 1438 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Certainly, a bill enacted by the Arkansas Legislature to outlaw all existing cable operators or to replace them with government speakers would raise grave First Amendment concerns. Yet the crux of the court of appeals' opinion is that the Arkansas Legislature foresaw and authorized the exact same result when it passed legislation allowing municipalities to operate cable systems. There is no legislative history or record that supports that position.

If any conclusion can be drawn from the record, it is that the Arkansas Legislature meant to promote municipal entry, and hence *add* competition, and to ensure the introduction of cable into rural communities that did not have service, not that it meant to *displace* competition,

and certainly not that it meant to authorize municipalities to destroy private First Amendment speakers through anticompetitive and predatory marketplace conduct. That is exactly what is happening in Paragould. Armed with its antitrust exemption, the City is currently utilizing, we believe, all manner of predatory and anticompetitive conduct to attempt to drive Cablevision out of business. And unless this decision is revisited and altered, dozens of other municipal governments may well do the same.

Courts generally will attempt to avoid constructions of statutes that raise significant constitutional questions. *See, e.g., United States v. Rumely*, 345 U.S. 41, 45 (1953); *Crowell v. Benson*, 285 U.S. 22 (1932). In this case, there is an interpretation of the Arkansas legislation that is more consonant with the First Amendment status of cable operators—*i.e.*, the legislation authorizes municipal entry, but does not authorize anticompetitive municipal acts, such as predation or leveraging.

III. THE COURT FAILED TO APPLY RELEVANT SUPREME COURT PRECEDENT IN ANALYZING THE FIRST AMENDMENT WAIVER CLAIMS.

In light of the presumption established by the Supreme Court against waivers of constitutional rights and the constitutional standard that such waivers must be voluntary, knowing, and intelligent, the court of appeals' dismissal of Cablevision's First Amendment claims was erroneous. The court of appeals' decision is completely devoid of any record analysis whatsoever of whether the alleged waiver by Cablevision through the franchise agreement was given knowingly and voluntarily. The thrust of the Court's decision is that a local government, in exchange for a franchise grant, is free to extract the entirety of the First Amendment rights recognized by the Supreme Court.[13]

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[13] *See, e.g., Leathers, supra; Preferred, supra.* Under the federal 1984 Cable Act, a cable system cannot operate without a franchise. 47 U.S.C. § 541(b) (1991).

The court recognized that Cablevision had expressed a valid First Amendment claim because it had to solicit the City's permission to engage in commercial speech, a position contrary to the contentions of the City and the district court. However, according to the court of appeals, "Cablevision effectively bargained away some of its free speech rights" when it entered into the agreement and further "simply failed to protect its commercial rights." (App. 8a).

Cablevision submits that the court jumped much too quickly to the conclusion that a valid waiver of First Amendment rights had occurred. It is well settled that for a constitutional waiver to be effective, it must be voluntary, knowing and intelligent, *Edwards v. Arizona*, 451 U.S. 477, 483-85 (1981); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); and that there is a presumption against the waiver of constitutional rights. *Brookhart*, 384 U.S. at 4. Furthermore, such waivers must be established by "clear" and "compelling" evidence. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). In finding a waiver here, the court never engaged in the analysis mandated by this precedent.

Moreover, the determination of whether there has been an intelligent waiver of a constitutional right depends on "particular facts and circumstances surrounding [each] case, including the background, experience and conduct of [the person or entity charged with the waiver]." *Johnson v. Zerbst*, 304 U.S. at 464. Since the complaint was dismissed prior to discovery and without a hearing, no record exists that permits such an analysis.

If the court of appeals was assuming that signing a franchise agreement must always constitute a constitutional waiver, that assumption, we contend, is erroneous.

The Seventh Circuit has questioned whether a constitutional waiver should ever be found to insulate provisions in a cable franchising agreement (albeit in dicta). *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 839 (1990). While rejecting a cable company's attempt to obtain the restitution of a fine for violation of local origination provisions of franchise agreements, the Seventh Circuit said:

> Conceivably it could also be argued that CCTV contractually waived its First Amendment claim. In *Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988), the Third Circuit, after determining that constitutional rights, like rights and privileges of lesser importance, may be contractually waived, construed a consent decree settling a lawsuit between two rival cable programmers and the City of Erie as barring a later action by one of the cable programmers against the City. Since the consent decree settled a suit which included a First Amendment claim, the Third Circuit believed a later comparable First Amendment claim to be waived. Of course in this case the only contract was the initial franchising agreement, a significant distinction from *Erie*, and serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights, *see, e.g., Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 657-658 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 592-593 (1926). In any event we need not decide this issue since neither party advanced this argument here or in the district court.

Id. at 1548 n.6.

The potential damage to a cable operator's (and ultimately the public's) First Amendment rights through the

franchising process is potentially enormous. For example, cable operators, including Cablevision's parent, increasingly have originated local news programming.[14] Under the court's approach, a municipality could condition the grant or renewal of a franchise on the operator agreeing to forego or tailor its local coverage to the government's request. The recognized First Amendment rights a cable operator possesses—for the public's benefit—should not be so ephemeral.

We are not contending that a waiver of a cable operator's constitutional rights can never occur in proper circumstances. The dismissal of Cablevision's claims, however, improperly rests on an unresolved question of fact. The court should have reversed the dismissal of Cablevision's First Amendment claims and remanded for the development of a record on all relevant issues, including any waiver defense, by the City.[15]

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[14] *See, e.g.*, "Fires, School Board Meetings and Accidents, 24 Hours a Day," *Business Week*, Dec. 17, 1990, at 32; "News 12's Success Spawning 'Clones,'" *Multi Channel News*, Feb. 19, 1990.

[15] If a court ultimately concludes that what otherwise would be a First Amendment violation had been waived by Cablevision, then it would have to confront another issue before it (or the City) could conclude that the contract restriction is enforceable—*i.e.*, whether the provision has been preempted by the Cable Act of 1984, 47 U.S.C. § 556(c) (1991), as inconsistent with 47 U.S.C. § 544 (1991). That issue also requires a better record than the non-existent one that exists at this point in this case and further supports reversal and a remand on the First Amendment claim.

CONCLUSION

Cablevision is not asking the courts to protect it from competition, even from municipal competition. It does believe it is entitled to protection from predatory and anticompetitive competition from a municipally-owned cable system, and nothing in the federal antitrust laws or Arkansas law prevents that result. As a First Amendment speaker, much more than a non-existent record is required before a contrary conclusion can be reached.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 16, 1991

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1820

PARAGOULD CABLEVISION, INC.,
Appellant,

v.

CITY OF PARAGOULD, ARKANSAS; PARAGOULD LIGHT & WATER COMMISSION; CHARLES PARTLOW; DON PERKEY; DOUGLAS J. SMITH; TIM WOOLDRIDGE; BEN BRANCH; PHYLLIS DEES; JAY W. DORTCH; FRANK GATLIN; JAMES INNESS; GEORGE COOK; JEPTHA FUTRELL; JERRY JETTON; WILLIAM BREWER; and MACK SHOTTS,
Appellees.

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: October 26, 1990

Filed: April 15, 1991

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON and HEANEY, Senior Circuit Judges.

HEANEY, Senior Circuit Judge.

Paragould Cablevision (Cablevision) appeals from the district court's grant of the City of Paragould's (Paragould) and its Light and Water Commission's (CLW) motions to dismiss Cablevision's claims pursuant to Fed. R. Civ. P. 12(b)(6). Cablevision charged Paragould with

violations of the Sherman Act,[1] infringements of its first and fourteenth amendment rights, and breach of contract. The district court dismissed the federal claims with prejudice and then dismissed Cablevision's state-law contract claims without prejudice pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). We affirm.

FACTS

In December 1983, Cablevision entered into a cable television franchise agreement with Paragould. The agreement runs through 1993, with provisions for two five-year extensions. The franchise agreement is expressly nonexclusive. Despite this stipulation, Cablevision initially did not face any competition in the Paragould cable television market. However, in response to dissatisfaction with Cablevision's services, the voters of Paragould approved an ordinance in June 1986 authorizing the CLW to construct and operate a municipally owned cable television system. To finance the system, the residents of Paragould passed an October 1989 referendum which authorized Paragould to issue $3.22 million of municipal bonds. In January 1990, Paragould authorized the bonds to be issued. Later that month, Cablevision filed this suit against Paragould, the CLW, and various officers of these entities. As noted, the district court dismissed Cablevision's federal claims for failure to state a cause of action upon which relief could be granted and declined to exercise pendent jurisdiction over Cablevision's contract claims.

DISCUSSION

Cablevision appeals the district court's dismissal of its antitrust and constitutional claims.

I. *Antitrust Claims*

In a series of cases culminating in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Supreme

[1] 15 U.S.C. § 2 (1988).

Court established that "before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Id.* at 40. More specifically, to withstand an antitrust challenge, the municipal conduct must be supported by "a clearly articulated and affirmatively expressed state policy." *Id.* at 44. In implementing this law, this circuit has explained that "the state policy to displace competition can be inferred 'if the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.'" *Scott v. City of Sioux City*, 736 F.2d 1207, 1211 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), quoting *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir. 1983). A municipality is therefore subject to searching antitrust scrutiny and can defeat antitrust challenges only if the anticompetitive consequence necessarily and reasonably results from engaging in the authorized activity. Importantly, "the Supreme Court has made clear that 'a specified, detailed legislative authorization' of monopoly service need not exist to infer the necessary state intent. *City of Lafayette v. Louisiana Power & Light Co.*, [435 U.S. 389, 415 (1978)]. It is sufficient that 'the legislature contemplated the kind of action complained of.' *Id.* (citation omitted)." *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1012 (8th Cir. 1983).

In a recent opinion, the Supreme Court suggested in dicta that there may be a market participant exception to state immunity. *See City of Columbia and Columbia Outdoor Advertising v. Omni Outdoor Advertising*, 1991 WL 41544.[2] As yet, however, the market participant ex-

[2] The Court voiced this suggestion on two occasions in its opinion: "[T]his [antitrust] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." "We reiterate that, with the possi-

ception is merely a suggestion and is not a rule of law. Until such a transformation occurs, we will continue to use the necessary and reasonable test established by this circuit.

Cablevision concedes that Arkansas law permits Paragould and the CLW to enter into the cable television business.[3] Cablevision objects, however, to both the method chosen to effectuate this entry, and to what it alleges is Paragould's predatory intent to destroy competition. Cablevision claims that by granting cable television rights to the CLW, Paragould has facilitated "monopoly leveraging," which has been defined as "the use of (1) monopoly

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ble market participant exception, any action that qualifies as state action is 'ipso facto' . . . exempt from the operation of the antitrust laws.'"

[3] The relevant statutes provide:

> 14-199-601. Authority of municipalities generally—Nonliable.
>
> (a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting, and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.
>
> (b) In no case shall a city or town be held liable for damages for failure to furnish or provide the service.

Ark. Stat. Ann. § 14-199-601 (Supp. 1989).

> 14-199-602. Appliances, fixtures, and equipment authorized.
>
> The city or town may erect, construct, operate, repair, and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guywires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal distribution system.

Ark. Stat. Ann. § 14-199-602 (Supp. 1989). *See also*, Ark. Stat. Ann. §§ 14-199-303 & 309 (1987), which authorize municipalities to issue capital improvement bonds.

power in one market to (2) restrain competition in a second market." *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 506 (6th Cir. 1983). Cablevision objects to the potential for the CLW to exploit its monopoly status in supplying utilities to drive Cablevision out of the Paragould cable television market. Cablevision argues that this potential exploitation exposes the predatory intent of Paragould and the CLW. According to Cablevision, this intent violates antitrust law because, although the statutes at issue allow a municipality to become a competitor in the cable television industry, they do not allow the municipality to place limitations on private competitors. Cablevision argues that its inability to engage in the monopoly leveraging which Paragould will permit the CLW to exploit results in Paragould placing a de facto limitation on Cablevision.

The district court rejected Cablevision's arguments. Characterizing the relevant statutes as "broad," sweeping," and "comprehensive," the district court concluded that these statutes authorized Paragould to develop its own cable television system, despite the anticompetitive implications of Paragould's particular conduct. We affirm the district court's decision, particularly in light of the voluminous case law reaching similar conclusions. *See, e.g., City of Columbia and Columbia Outdoor Advertising v. Omni Outdoor Advertising*, 1991 WL 41544 (city is immune from antitrust liability where its restriction of competition is a foreseeable result of implementing action authorized by state law); *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 522 (8th Cir. 1985) (holding state action immunity doctrine applicable to a city's award of exclusive solid waste disposal franchise); *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1007 (8th Cir. 1983) (holding defendants "shielded from federal antitrust liability because they established the municipal ambulance system pursuant to state authorization and a clearly articulated and affirmatively ex-

pressed state policy to displace free competition in the ambulance business").[4]

Arkansas has clearly authorized municipalities to enter into the cable television business. *See supra* note 2. Municipalities generally enjoy access to extant governmental infrastructure such as utility poles and rights of way. When a municipality, such as Paragould or its entity, the CLW, enters into the cable market, it necessarily will benefit from this access. Thus, by virtue of their status, Paragould and the CLW do not have to build their cable television operations from scratch. Presumably, rent-free office space is available, employees and "executives" are already hired and presently serving in other capacities, trucks and equipment to service cable needs are available, demographic information has been compiled and computerized, rights of way have been secured for other purposes, and utility poles are already standing. If the Arkansas legislature did not intend the utilization of these resources and the resultant benefit of being able to supply cable services with diminished overhead costs, it would have tailored the enabling statutes accordingly. Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies.

We hold that a sufficient state policy to displace competition exists here since the challenged anticompetitive restraint is a necessary and reasonable consequence of Paragould's statutorily authorized entry into the cable television business. Accordingly, state action immunity attaches to the acts of Paragould and the CLW with respect to their development of a cable television system and the district court properly granted their 12(b)(6) motions.

---

[4] The Supreme Court's recent decision to grant municipalities immunity against being sued when they award local monopolies to private businesses also supports our holding.

II. *Constitutional Claims*

Cablevision also objects to the district court's dismissal of its first and fourteenth amendment claims. Cablevision specifies three first amendment violations. First, according to Cablevision, a provision of the franchise agreement between it and Paragould infringes its commercial free speech rights by requiring Cablevision to notify and gain the approval of Paragould before soliciting advertising to air on its system. The relevant provision, Section 2.4 of the franchise agreement, stipulates:

> This agreement does not cover major technical advances in TV reception and use, in cable TV or in TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of [Cablevision] such as advertising over [Cablevision's] cable TV system. If [Cablevision] should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation.

Second, Cablevision argues that the franchise agreement between the CLW and Paragould, which contains no restriction on income-producing activities such as advertising, violates the first and fourteenth amendments by favoring certain speakers over others. Because Section 2.4 limits Cablevision's ability to engage in commercial speech, and because the CLW is not similarly restrained, Cablevision claims that this differing treatment infringes both its first amendment free speech and its fourteenth amendment equal protection rights. Finally, Cablevision maintains that Paragould will permit advertising only if a portion of the advertising revenues is included in the

franchise fees paid by Cablevision to Paragould. The CLW is not similarly burdened. Cablevision claims that this selective imposition of a franchise fee constitutes a discriminatory media tax, whereby by one member of the media suffers from differential taxation relative to its competitors. *See Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 578-79 (1983).

After reviewing each of these arguments, we affirm the district court's dismissal of Cablevision's constitutional claims. First, we agree with the district court's judgment that Section 2.4 "is contractual in nature . . . ." Nonetheless, we recognize that Paragould's alleged insistence on honoring the terms of the contract does indeed inhibit Cablevision's ability to air commercials, and thus limits free speech in the purest sense. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980). By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights. Cablevision could have bargained for an unqualified right to solicit and transmit advertisements. No law mandated otherwise. Cablevision simply failed to protect its commercial rights. Presumably Cablevision received consideration in return for this sacrifice, but apparently what was once considered a satisfactory bargain has turned into a sour deal. Regardless, Cablevision cannot now invoke the first amendment to recapture surrendered rights.

Without a finding that Section 2.4 implicates constitutionally protected free speech rights, Cablevision's second argument that Paragould's franchise agreement with the CLW unconstitutionally favors the CLW by not including a provision similar to Section 2.4 collapses. Cablevision contends that the dichotomy between the two contracts creates an equal protection problem involving first amendment rights. In making this distinction, Cablevision forgets that it bargained for its franchise agreement. Cable-

vision voluntarily entered into the franchise agreement, presumably for its own economic gain. The forum for protecting its free speech rights was the bargaining table, not the courtroom seven years later.

Cablevision's allegation of a discriminatory media tax also lacks merit. We are inclined to agree with the district court that this claim is premature. As yet, Paragould has not extracted any sort of "advertising fee" from Cablevision nor has Cablevision submitted any convincing evidence to support the imminency of such a fee. Hence, a justiciable controversy for Article III review does not exist. However, because we are reviewing Cablevision's claims pursuant to a motion to dismiss, we will accept its allegation of a media tax as true. Even when we accept this issue as being substantively ripe, we again hold that Cablevision bargained for its position and therefore must comply with the terms of the franchise agreement.

III.

The district court properly granted defendant's motions to dismiss Cablevision's antitrust and constitutional claims with prejudice. We also affirm the district court's refusal to exercise jurisdiction over the pendent state contract claims, which the trial court appropriately dismissed without prejudice.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

J-C-90-14

PARAGOULD CABLEVISION, INC.,
Plaintiff,

v.

CITY OF PARAGOULD, ARKANSAS, *et al.*,
Defendants.

ORDER

[Filed May 9, 1990]

In this action plaintiff seeks injunctive relief for alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 2 (1976), the First and Fourteenth Amendments to the United States Constitution as well as the laws of the State of Arkansas. At issue before the Court are defendant City of Paragould and its Light and Water Commission's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff has responded. The Court will grant the motions for the reasons indicated in the body of this Order.

I. THE STANDARD ON MOTIONS TO DISMISS

Under a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted the complaint is to be construed in the light most favorable to plaintiff and its allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *See also Baxley-DeLamar Monuments, Inc. v. American Cemetery Association*, 843 F.2d 1154 (8th Cir. 1988).

The critical issue is the sufficiency of the complaint which is governed by the pleading standard stated in Rule 8(a). A pleading setting forth a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Included then, in the determination of whether a claim is stated is the calculus of whether relief can be granted on this claim. *Davis v. Passman*, 442 U.S. 228 (1979).

The sufficiency requirement most frequently utilized is derived from the Supreme Court's pronouncement that

> in appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41 (1957).

Mindful of these guiding principles, the Court addresses defendants' motions.

II. FACTS

A. Parties and Jurisdiction

Plaintiff Paragould Cablevision, Inc. ("PCI") is a Massachusetts corporation headquartered and with its principal place of business in Greene County, Arkansas. Plaintiff operates a cable television system in Paragould, Arkansas under a franchise agreement entered into on November 28, 1983.

The complaint names 16 defendants including the City of Paragould ("the City"), its Light and Water Commission ("LWC"), the mayor and 13 individual members of the City Council and the Light and Water Commission. Paragould is an incorporated city and the LWC is a municipal entity created under A.C.A. § 14-200-106 with

the charge to operate the City's water and electric systems.

Jurisdiction lies under Section 16 of the Clayton Act of 1914, codified at 15 U.S.C. § 26, 42 U.S.C. § 1983, 28 U.S.C. § 1331 and by pendant jurisdiction over the State law claims. Venue is proper in the Eastern District of Arkansas pursuant to 28 U.S.C. § 1391(b).

B. Background

The Franchise Agreement entered into between the City and PCI was explicitly termed non-exclusive. In the past seven years, plaintiff has had no competition in the operation of its cable system in Paragould. However, on June 17, 1986 an ordinance authorizing the construction and operation of a municipal cable system was approved by referendum vote and on January 16, 1989, a franchise agreement was concluded between the City and LWC for the latter to build and operate a system in Paragould. To finance the municipal system, the City conducted a referendum vote to authorize issuance of $3.22 million of municipal bonds which passed on October 31, 1989. On January 22, of this year, the City acted pursuant to the referendum and authorized the bonds to be issued.

C. The Nature of the Claims Alleged

Plaintiff's 17 page complaint alleges numerous violations in three Counts which are divided among antitrust violations, violations of the First and Fourteenth Amendments, and breach of state contract law claims respectively.

The alleged Sherman Act violations derive from the Section 2 monopoly prohibition which states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

Plaintiff alleges *inter alia* that its Count I claims assert "its right to be free from unfair and illegal competition brought about by Defendants' dual role as a direct competitor of Cablevision and as a utility operator with exclusive control over utility poles which are vital to the existence of Cablevision." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, p. 2 (hereafter "Plaintiff's Memorandum"). Specifically, plaintiff asserts a monopoly leverage theory of liability which is defined as "the use of monopoly power in one market to amplify or 'leverage,' a position in another competitive market." *Kerosotes Michigan Theatres v. National Amusements*, 854 F.2d 135, 137 (6th Cir. 1988), *cert. dismissed*, —— U.S. ——, 109 S.Ct. 2461 (1989) (citations omitted). Here, the defendants are alleged to possess a monopoly over the electricity and water services and are allegedly attempting to "leverage" their economic power in the cable television market. The acts comprising violations under this theory are (1) LWC's ownership of electric utility poles and its power, under the Pole Attachment Agreement, entered into by PCI and LWC, to restrict PCI's use of those poles and to terminate the Agreement under certain circumstances; (2) the failure to correctly assess and include the cost of the relocation of utility poles necessary for installation of LWC's cable system wires in the financial estimates for the project used by the City; and (3) LWC's plan to string cable wire in alleged violation of

certain spacing safety standards promulgated in the National Electric Safety Code.

Defendants assert their immunity to antitrust liability under the "State Action Immunity" doctrine and argue that, in any event, not only does the complaint fail to state a Sherman violation but any alleged violations have yet to occur and are unripe.

Plaintiff in Count II alleges violations of the First and Fourteenth Amendments stemming from restrictions imposed on PCI's unfettered right to sell and transmit advertising in the absence of similar restrictions on LWC's ability to do likewise. Plaintiff finds that these contractual disparities constitute regulation of legitimate commercial speech in the absence of substantial state interest. PCI also alleges that the restrictions amount to "selective taxation in a situation where, all things being equal, one party remains exempt from taxation and the other party does not." *Id.* at p. 19.

For their part, defendants argue that a probable franchise fee of 3% on any additional advertising is not so burdensome as to rise to the level of a First Amendment violation and the claim of unequal treatment in a contractual setting similarly does not state a violation of the Fourteenth Amendment.

Count III alleges breaches of good faith and fair dealing amounting to contractual breach under Arkansas law.

Defendant seeks dismissal under *Mine Workers v. Gibbs*, 388 U.S. 715, 86 S.Ct. 1130 (1966), for lack of federal jurisdiction over the pendant state claims.

III. THE ANTITRUST CLAIMS

A. Legislative Immunity

As an initial matter the Court finds that plaintiff's claims against the individual members of the City and the members of the LWC under 42 U.S.C. § 1983 are

barred. Legislators are absolutely immune from suit for all damages or injunctive relief when performing their roles "in a field where legislatures traditionally have power to act." *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980). When engaged in the implementation of laws, city or executive officers are not absolutely immune. *See e.g. Latino Political Action Comm. v. City of Boston*, 581 F.Supp. (D.C. Mass. 1984), *aff'd*, 784 F.2d 409 (1st Cir. 1986).

Here, there is no allegation that the individuals named as defendants acted in any capacity other than their official ones. The City Council and the LWC have not been said to have implemented laws in violation of the constitutional rights of plaintiff.

It is also a point worthy of note that although municipalities are granted immunity from damages arising from their anticompetitive acts in violation of the antitrust laws under the Local Government Antitrust Act of 1964, 15 U.S.C. §§ 34-36, this act

> in no way affects a plaintiff's ability to bring suit against a local government for injunctive relief against 'threatened loss or damage by a violation of the antitrust laws' under Section 16 of the Clayton Act, 15 U.S.C. § 26. Nor does it prevent the award of reasonable attorney's fees to a plaintiff "substantially prevailing' in such a suit. In such injunctive actions, the defendant(s) would be forced to rely on traditional antitrust analysis, rather than the Local Antitrust Act, to seek immunity or to establish other defenses.

Sinel, *The Lawful Regulation of Cable Television*, 241 PLI/Pat 259, p. 44 (Westlaw) (1987). We now reach the issue of immunity under traditional antitrust doctrines.

B. State Action Immunity

1. *The Basis for the Doctrine*

States are possessed of immunity from antitrust liability when acting as the "sovereign". *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943). The source of this rule has been alternatively attributed to the needs of federalism under the model of preemption or to an exceptional status accorded states under the antitrust regime. Under federalism theory courts recognize the existence of two sovereigns, the federal and the state. The operative inquiries are: has the federal government exclusively occupied the field and even if not, are the laws of the federal and state governments so in conflict as to irrevocably collide. In the words of Chief Justice Stone, "the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker* at 351.

Under the rubric of "state action exemption," a term often used by courts, we observe that there is only one sovereign on display, the federal power, and that this sovereign may permit certain exceptions:

> courts routinely presume that antitrust is the dominant national policy and that, accordingly, it should be displaced only where there is plain repugnancy between the enactments—and even then "only to the minimum extent necessary." Since most federal regulations postdate the passage of the Sherman Act in 1890, the tendency is to regard regulation as an alien intruder into antitrust's domain. Thus the exemption cases are generously sprinkled with such shibboleths as "[r]epeals of the antitrust laws by implication . . . are strongly disfavored. (Citations omitted).

Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1374, 1378-79 (1978) (quoted in Kalinowski, 6 *Antitrust Laws and Trade Regulation*, § 46.04[1] (1989)).

The Supreme Court has decided cases since *Parker* under both doctrinal heads but it seems clear that the doctrines are in conflict. In *Cantor v. Detroit Edison*, 428 U.S. 579, 96 S.Ct. 3110 (1976) and in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978) the Court's holdings were bottomed on the immunity-as-exception theory. The dissenters in *Community Communications v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982) *rev'g* 630 F.2d 704 (10th Cir. 1980) opined the majority's neglect of the Supremacy Clause and "our basic notions of federalism." *Id.* at 61.

> Because pre-emption treads on the very sensitive area of federal-state relations, this Court is "reluctant to infer pre-emption," [citation omitted] and the presumption is that pre-emption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States. [Citation omitted].

Id. In recent cases the Court has invoked preemption concerns as the basis for the immunity but has not resisted the siren call of terming the immunity "state action exemption." *See 324 Liquor v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 725 (1987), *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1662, *reh'g denied*, 108 S.Ct. 2921, (1988).

2. *The Parker Doctrine Applied to Municipalities*

While *Parker* taught that a state's otherwise anti-competitive acts would not be scrutinized under the same penetrating eyepiece as private entity's, it did not reach the issue of the status of the state's political subdivisions.

In *City of Lafayette, supra*, the Supreme Court expressly removed cities from the broad *Parker* immunity on the basis of their status alone. The immunity conferred by *Parker* was formulated as follows: "*Parker* exempts only anti-competitive conduct engaged in as an

act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 98 S.Ct. 1137. Whenever cities act as "agents" of the State they are "free to implement state policies without being subject to antitrust laws to the same extent as would the State itself." *Id.* The question of when a local entity is acting in the guise of "agent" is answerable when the State's grant of "authority . . . to operate in a particular area [indicates] that the legislature contemplated the kind of action complained of" in the antitrust complaint. *Id.* at 1138. Legislative contemplation was heralded as "a clearly articulated and affirmatively expressed" policy but a city need not "be able to point to a specific, detailed legislative authorization."

Four years later the Court found that a city operating by dint of its home rule power rather than under authority of the state was not cloaked in *Parker* immunity. The operative determination in *City of Boulder, supra,* was the neutrality of the state *vis a vis* Boulder's decision to restrain the expansion of its private cable company's service. "A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anti-competitive actions for which the municipal liability is sought." Thus the outer reaches of municipal *Parker* immunity were defined.

With the parameters of immunity taking recognizable shape, the Court proceeded to refine the doctrine of municipal *Parker* immunity in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713 (1985). The Court's opinion effectively removed the second prong of the traditional two prong test for state action immunity stated by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937 (1980). There, in the context of anticompetitive activities of a state sponsored private party, in addition to the grant of authority by a state, active state supervision was re-

quired for immunity to apply. Whether supervision was also required when the actor was a local unit of government was left in the air, even in *Boulder. Town of Hallie* grounded the issue and held: "[w]e now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.* at 1720.

3. *"Clearly Articulated and Affirmatively Expressed State Policy"*

The issue before the Court is whether the City of Paragould and its Light and Water Commission acted under a "clearly articulated and affirmatively expressed state policy." The Court will treat the potential liability of the LWC as coterminous with that of the City unless a distinction presents itself.

In *L & H Sanitation v. Lake City Sanitation*, the Eighth Circuit summarized its *Parker* inquiry in two steps:

> First, the state legislature must have authorized the challenged municipal activity. Second, the legislature must have intended to displace competition. [Citation omitted]. [T]he state policy to displace competition can ge inferred "if the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.

769 F.2d 517, 421 (8th Cir. 1985). *See also Scott v. City of Sioux City*, 736 F.2d 1207, 1211 (8th Cir. 1984); *Gold Cross Ambulance v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864 (1985). The opinion in *L & H Sanitation* affirmed this Court's finding of municipal immunity for Lake City's grant of an exclusive franchise for disposal of its solid waste. The Court found that in passing the Arkansas Solid Waste Management Act conferring broad authorities on cities to regulate the disposal of their solid

waste the legislative intended for municipalities to take action to "displace competition" and that such acts would be "a necessary consequence of engaging in the authorized activities." *Id.* at 522.

Plaintiff here argues that while the City's decision to enter into the Paragould cable market is no violation of the Sherman Act, its "intent to destroy any competition in cable television in Paragould," that is, its "*methods*," do "state an antitrust claim." Plaintiff's Memorandum pp. 8-9. And, argues plaintiff, citing dicta in a footnote in this Court's decision in *Brazil v. Arkansas Board of Dental Examiner*, "if the agency or municipality exceeds the bounds of its authority to establish trade restraint, *Parker immunity will not attach.*" 593 F.Supp. 1354, 1361 n. 5 (E.D.Ark. 1984), *aff'd* 759 F.2d 674 (8th Cir. 1985). Of course, the issue of whether the City has acted *ultra vires* will be decided by the same process as the determination of whether immunity should attach, the existence of proper state authorization. Plaintiff's argument is therefore tautological.

In 1987 the General Assembly of Arkansas passed two statutes relating to cable television. The first, contained in Act 328 of 1987 § 1, and codified at A.C.A. § 14-199-601, states in subsection (a):

> Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, and operate a television signal distribution system for the purpose of receiving, transmitting and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

To this general grant of power is appened a second, more specific statute, 14-199-602, which provides with Levitical precision that:

> [t]he city or town may erect, construct, operate, repair, and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy-wires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal system.

Municipal capital improvements, including "facilities for the generation, transmission, and distribution of television communications" may be financed by issuance of municipal bonds, subject to the passage of an authorizing ordinance and approval by the electorate of the municipality. A.C.A. §§ 14-164-303, 309 (1989).

Predictably, plaintiff argues that "the generalized language used in the authorizing statutes cited by Defendants is not nearly enough to provide the overbroad exemption Defendants are claiming." Plaintiff's Memorandum, p. 6. Plaintiff is mistaken.

The Court notes that plaintiff terms the grant of powers to cities, "general," but the Court would add to that characterization the adjectives "broad," and even without much hyperbole, "sweeping" and "comprehensive." The Court therefore finds that these statutes authorize the entry of the city into the market and reflect the state's policy to permit the city "to displace competition" since "the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity." *L & H Sanitation, supra.* The Court also finds that the legislature necessarily contemplated the possibility that cities would choose to develop their own cable television system despite the anticompetitive nature of that decision. Defendant's argument directed to this point is well taken.

The clear delegation of control to cities over their television systems expressed in the cited statutes makes the Court's finding of immunity for the City and its LWC

relatively straightforward. *See also* Saylor, *Selected Antitrust Issues Facing Cable Television Operators, Suppliers and Competitors*, 267 PLI/Pat 107 (1989). *Cf. City Communications, Inc. v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989) (city immune because state constitutional grant to municipalities to control the public streets reasonably foresaw decision by local government not to renew non-exclusive franchise even without mention of cable television); *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354, 359-62 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1537 (1989) (*Parker* immunity attaches since state statute expressly contemplates municipal ownership of public utilities and state constitution expressly contemplates franchising of public utilties); *Best View Cablevision, Inc. v. City of Abbeville*, 758 F.2d 1408 (4th Cir. 1986) (renewal and order to vacate poles was within express South Carolina statutory authorization to 'regulate' cable operations and was immune under *Parker*); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (city's grant of nonexclusive franchise and rejection of plaintiff's application were actions pursuant to a state statute expressly empowering city to restrict operation and construction of cable systems and, hence, was immune under *Parker*); Moreover, the Court notes that

> [n]narrowly drawn, explicit delegation is not required. The Supreme Court has never held 'that the challenged municipal conduct need to be inescapably mandated by the State."

Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1413-14 (9th Cir. 1985), *aff'd on other ground*, 467 U.S. 488, 106 S. Ct. 2036 (1986). As understood by the Supreme Court in its early pronouncement in *City of Lafayette*:

> [w]ere it otherwise, the specter of antitrust liability would unduly hamper the state's ability to allocate governmental authority between itself and its sub-

> divisions. Restricted too would be its use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level.

98 S.Ct. at 1138 (plurality opinion).

With the finding that state action immunity attaches to the acts of the City and the CLW the Court will not reach the merits of plaintiff's claim of monopoly leveraging violations or any other violations under § 2 of the Sherman Act. Count I of the complaint will be dismissed in its entirety.

IV. THE FIRST AND FOURTEENTH AMENDMENT CLAIMS

The First Amendment is applicable to the states by incorporation into the Fourteenth Amendment. The First Amendment protects commercial speech subject to significant limitations. The initial inquiry, of course, is whether or not speech is implicated at all in the state action that is the subject of the claim. In other words, is there regulation and if so, does that regulation infringe on protected speech. If so found the reviewing court must ascertain whether the commercial speech concerns a lawful activity and is not misleading or fraudulent. Once these initial hurdles are cleared the court must employ a three-part test. The interest of the government in the particular regulation must be "substantial," the regulation must "directly advance" the government's asserted interest, and finally, it must be "no more extensive than necessary." *Posados de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968 (1986).

Plaintiff first claims that the provision of its 1983 Franchise Agreement that requires PCI to engage in a process of negotiation and modification of its Agreement with the city should it choose to air advertisements on its cable networks violates its First Amendment rights. Section 2.4 reads in relevant part as follows:

> This agreement does not cover major technical advances in TV reception and use, in cable TV or in TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of Grantee such as advertising over Grantee's cable TV system. If Grantee should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation.
>
> * * * *
>
> The parties also recognize that such advanced technology may make cable TV as contemplated by this Agreement obsolete or virtually certain to be unprofitable to the operator. Upon the practical advent of any such technical advance, either party may propose that this Agreement be opened for further negotiation and modification so that each party may better protect its interests.

Plaintiff's constitutional claim that this provision "amounts to a restriction on *all* advertising by Cablevision" is, in the Court's view, a considerable leap. Plaintiff's Memorandum, p. 18. It seems clear to the Court that the purpose of Section 2.4 is to anticipate contractual contingences for the protection of the parties. The phrase "cable TV as contemplated by this Agreement" fully captures this spirit. The Court finds that the requirements complained of do not outlaw or curb advertisement as protected commercial speech. Rather, they offer the parties a mechanism by which they may, at their election, submit proposals for the modification of existing contractual terms should unusual circumstances so require. The

Court notes the permissive language in the provision: "[i]f Grantee should decide to . . . undertake other income producing activities," which makes the process of modification wholly elective. Since the decision to air advertisements is outside the Agreement, 2.4 does not constitute regulation of commercial speech. At most it could be characterized as a mechanism for mutual regulation of an Agreement which infringes on speech rights to the same extent as it prevents the advent of technological changes in Paragould; that is to say, not at all. In short, this provision is contractual in nature and does not seek, nor have the effect of, regulating speech of any kind.[1] This claim will be dismissed.

From this conclusion of law flow others. Since speech is not restricted by Section 2.4, the absence of a similar provision in the City's agreement with LWC could not rise to a violation of the Fourteenth Amendment Equal Protection Clause nor does it "restrict the speech of some elements of society in order to enhance the relative voice of others" as suggested by plaintiff. Plaintiff's Memorandum, p. 18 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). A party contracting to buy widgets from Company A does not violate equal protection when it contracts to buy zidgets from Company B.

Finally, plaintiff's complaint alleges that "while [the City] may be willing to acquiesce to Paragould Cablevision's request to insert local advertisements, it will do so only if the revenues from such advertisements are included in the franchise fees paid" to the city. Complaint, para. 37. Such an inclusion, argues plaintiff, amounts to a selective and discriminatory media tax since LWC is

[1] The Court notes in passing that cities may place reasonable time, place and manner restrictions on the protected right to engage in commercial speech when the limits serve a significant governmental interest and leave open other channels of communication. *See e.g. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1825 (1976).

not, even in the abstract, subject to such a "tax." This claim is, as a threshold matter, premature since the issue rises, if at all, in the future, and therefore does not raise a justiciable controversy for Article III purposes. Along with its jruisdictional infirmity this claim is frivolous. Contractual modifications do not automaticaly become tax questions merely because one party is a political subdivision with taxing authority and, as found above, the provisions of 2.4 do not inhibit speech. This claim will also be dismissed.

V. THE PENDANT STATE-LAW CLAIMS

Becaus none of plaintiff's federal claims survive the 12(b)(6) motion to dismiss, federal jurisdiction over the state-law contract claims would, at this stage of this proceeding, be inappropriately maintained by this Court. *Mine Workers v. Gibbs*, 388 U.S. 715, 86 S.Ct. 1130 (1966). As the Supreme Court recently wrote:

> Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendant state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the law suit in its early stages and only state-law claims remain, the federal court should decline to exercise of jurisdictions by dismissing the case without prejudice.

Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 618-19 (1988). Accordingly, the Court will dismiss these claims without prejudice to future suits.

IT IS THEREFORE ORDERED that defendants' Motions to Dismiss be, and they are hereby, GRANTED. Counts I and II, comprising the antitrust and First and

Fourteenth Amendment claims, are dismissed with prejudice and Count III, containing the state-law claims, is dismissed without prejudice.

Dated this 8th day of May, 1990.

/s/ Garnett Thomas [Illegible]
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1820EA

PARAGOULD CABLEVISION, INC.,
Appellant,

v.

CITY OF PARAGOULD, ARKANSAS; *et al.*,
Appellees.

Order Denying Petition for Rehearing
with Suggetsion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

June 18, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

CABLE TV FRANCHISE AGREEMENT

KNOWN ALL MEN BY THESE PRESENTS, THAT

WHEREAS, Paragould Cablevision, Inc., a corporation organized under the laws of the State of Massachusetts with a place of business in Waltham, Massachusetts, authorized to do business in the State of Arkansas, hereinafter called "Grantee," is currently operating a cable television system in the City of Paragould, Arkansas with over 4,000 subscribers under Ordinance 721 as amended by Ordinance 1039, and desires to extend its franchise to continue to operate a cable TV system in Paragould; and

WHEREAS, the Mayor of the City of Paragould, Arkansas, has been authorized by Resolution #83-22, which supersedes Ordinances 721 and 1039 from and after the effective date hereof, to enter into this Agreement with Grantee;

NOW THEREFORE, the Ctiy of Paragould, referred to herein as "City" or "Grantor" and the Grantee agree as follows, to wit:

1. Grant of Franchise

(1.1) Subject to compliance by Grantee with its obligations under this Agreement as they mature, the Grantor hereby grants to the Grantee a non-exclusive franchise to operate a cable TV system throughout the entire City as now constituted (including during the term hereof any areas now outside the City which may become subject to the City's jurisdiction, without any need for specific modification of this Agreement). This franchise includes the right to install cable and other cable system hardware in, upon, along, over and under the City's streets, avenues and other public ways, subject to (1.11) and (1.12) below.

(1.11) Grantee shall utilize existing light, power, or telephone poles when economically and technically feasible

and shall pay an annual rental to the entity owning such poles, and if such entity is the City Light and Water System, that System shall be considered as a separate entity from the City of Paragould for the purpose of this Agreement. The rental shall be as agreed upon between the Grantee and the entity concerned.

(1.12) Before the Grantee erects its own pole or makes any other installation upon City owned or controlled property, the Grantee shall obtain a permit from the City Inspector and shall coordinate the work with the City Light and Water System and with any utility whose lines may be affected. Any pavements, sidewalks, curbing, or other installed improvement taken up and any and all excavations made by Grantee shall be done in such manner as to give the least inconvenience to the inhabitants of the City and the public generally. The work shall be completed with all convenient speed and the premises restored to at least the condition existing before the work was undertaken, all at the expense of the Grantee. The Grantee shall in addition make and complete records and "as installed" maps showing the location of its facilities in the City, with a copy furnished to the City. The Grantee shall not place poles or other fixtures where they will interfere with existing utility lines and installations.

2. Effective Date, Term and Renewal

(2.1) This Agreement shall take effect December 10, 1983 and shall continue in full force and effect until December 9, 1993; provided, however, that there shall be a review of the terms hereof and of the Grantee's performance hereunder at the end of the first five year period. Such review shall take place between December 11, 1988 and June 30, 1989. As a result of such review, the following matters may become subject to negotiation:

(a) Grantee's charges to subscribers if the review discloses either that Grantee is making an un-

reasonable profit or, despite competent management, is not making a reasonable profit.

(b) Grantee is failing to provide basic cable TV service to a substantial number of residents of the City who desire such service, if there is evidence to that effect.

(c) The nature and/or quality of Grantee's service if a substantial number of credible complaints relating thereto have been received.

(d) The Grantee's handling of complaints, changes, or charges or other interfaces with subscribers if such handling has been marginal or worse.

(e) The City's failure to comply with any terms of this Agreement in a timely, businesslike manner.

Any matter subject to negotiation shall be resolved by agreement and incorporated herein by written amendment.

(2.2) The Grantee shall have an option to extend this Agreement for an additional five years following the 10-year period identified in (2.1) above, provided Grantee gives Grantor notice of its desire to exercise such option between January 1, 1993, and June 1, 1993, subject to a review of Grantee's performance, essentially similar to the review described in (2.1) above, such review to be held within 2 months after receipt of such notice by the City. Such review shall also take into account the Grantee's utilization in the performance of its obligation hereunder of such advanced technology as may be offered in the cable television industry. As a result of such review, any issues subject to negotiation shall be resolved by agreement and incorporated in writing into this Agreement as extended by exercise of the option.

(2.3) This Agreement may be extended for an additional five-year period after December, 1998 by mutual agreement of the parties hereto; provided, that if either

party determines at any time during the five year period covered in (2.2) above that it does not wish to extend the Agreement from and after December 9, 1998, it will promptly give the other party written notice to that effect. If such written notice is not given, neither party may unreasonably withhold its agreement to the five year extension beginning December 10, 1998.

(2.4) This Agreement does not cover major technical advances in TV reception and use, in cable TV or in TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of Grantee such as advertising over Grantee's cable TV system. If Grantee should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation. The parties recognize that services involving use of such advanced technology may be offered by others (e.g. the telephone company) and that the offering of such services may not require a franchise agreement or a modification of this Agreement. The parties also recognize that such advanced technology may make cable TV as contemplated by this Agreement obsolete or virtually certain to be unprofitable to the operator. Upon the practical advent of any such technical advance, either party may propose that this Agreement be opened for further negotiation and modification so that each party may better protect its interests.

3. Indemnification and Insurance

(3.1) Grantee shall indemnify and save the City harmless from all losses sustained by the City on account of any claim or demand, whether litigated or not, arising out

of the operation and maintenance of Grantee's cable TV system covered by this Agreement. Grantor shall notify the Grantee promptly but in no event later than 30 days after the presentation of any claim or demand made against the Grantor which is indemnified hereunder. The indemnification provided by the Grantee hereunder shall include reasonable attorney's fees.

(3.2) The Grantee shall carry liability insurance covering property damage in an amount not less than $500,000 and covering personal injury in an amount not less than $1,000,000 as to any one person and not less than $3,000,000 as to any one accident. Such coverage shall apply to all of Grantee's operations including its vehicles, and shall be written by reputable insurance companies authorized to do business in the State of Arkansas. Grantee shall keep on file with the City Clerk a Certificate showing that such coverage has been obtained and is current. If Grantee employs contractors or subcontractors, it shall require adequate liability insurance to be carried by them during their employment by Grantee. Certificates furnished to the City Clerk shall include a statement from the insurer that in event of cancellation or other termination, the insurer shall promptly notify the City Clerk in writing.

4. Miscellaneous Authorities

(4.1) The City understands that Grantee will promulgate reasonable rules and regulations applicable to its subscribers which are necessary to enable Grantee to exercise its rights and perform its services under this franchise and to provide uninterrupted service to its customers.

(4.2) The Grantee recognizes that the City has the right of reasonable regulation of the erection, construction and/or installation of facilities by Grantee, including regulation of the location of such facilities of Grantee to be placed on property belonging to or under the control of the City.

(4.3) The Grantee shall, upon the request of any person holding a permit from the City for moving a building or other outsize load, temporarily raise or lower its wires to permit the passage of the load, provided the Grantee is given no less than 48 hours notice to arrange for such passage. The expense of such arrangement shall be borne by the party moving the outsize load, and the Grantee may request payment in advance.

(4.4) The Grantee shall have authority to trim trees which overhang streets, sidewalks and other public ways when such trimming is necessary to prevent interference with Grantee's wires and cables. Such trimming shall be done under the supervision of an authorized representative of the City, but at Grantee's expense. The entity known as City Light and Water may perform the trimming for Grantee and Grantee's request and expense, the charge to Grantee to be a matter for agreement between Grantee and City Light and Water System.

(4.5) If, during the time this Agreement is in effect, the City lawfully alters any street, sidewalk or other public way such that Grantee's poles, wires or other fixtures and equipment are affected, the Grantee, upon reasonable notice from the City, shall make such adjustments in its poles, wires or other fixtures and equipment as may be necessary (including but not limited to removal and relocation) at Grantee's expense.

(4.6) Nothing in this Agreement shall exempt or exclude Grantee from application of the City's police power or from the application of lawful City ordinances.

5. Operation and Maintenance of the Cable TV System

(5.1) Subject to applicable FCC regulations which specify "must carry" stations to the Grantee, the Grantee shall provide at its expense all equipment and facilities necessary to provide subscribers in the City a basic program of not less than 11 channels, to include: the major networks; the nearest "local" station (Jonesboro); a sta-

tion that broadcasts the Cardinal baseball games in St. Louis; one or more public TV stations; a religious station; an all sports network; one or more Little Rock stations including one that broadcasts the Razorback football and basketball games when they are televised; and one or more Memphis stations. It is recognized that there is possible overlap in these criteria (e.g.: a Little Rock station may also carry Razorback games). The objective is to provide a wide range from which the varied tastes and preferences of the greatest number of subscribers would most likely be satisfied, at the same time preserving a channel for a pay TV program such as HBO, Cinemax, or Showtime which would not require a converter. Either the Grantee or the City may propose to change the basic program from time to time, particularly if a showing can be made that the existing basic program does not satisfy the greatest number of subscribers. The party initiating a proposed change shall give the other party notice a reasonable time in advance and the parties will negotiate whether the proposed change is necessary and if so with respect to the effective date of the basic program change, any change in the charge to subscribers, and the method of handling the notice of change to subscribers. On or before the effective date of any change in the basic program, Grantee shall provide the City with a schedule showing the existing basic program, the effective date of the change, and the new basic program, and each party shall make a copy of that schedule a part of this Agreement by attaching a copy hereto.

(5.2) The Grantee shall also provide at its expense all equipment and facilities necessary to provide subscribers with TV programs outside the basic program for which Grantee may charge reasonable additional subscription rates. The Grantee shall furnish the City a schedule showing what these Pay TV programs are and the monthly charge per tier of such programs. A copy shall be attached to this Agreement and made a part hereof. Such Pay TV program tiers may be changed by Grantee from

time to time, provided advance notice is given to subscribers by Grantee. On or before the effective date of such change, Grantee shall furnish the City a schedule showing the existing tiers of Pay TV, the effective date of change, and the new tiers, and such schedule shall become a part of this Agreement.

(5.3) The quality, both visual and aural, of the programs transmitted to subscribers by Grantee, shall meet FCC engineering standards and be essentially the same as if the subscriber were located in the normal viewing area of the original broadcast, subject only to such degradation as may be caused by the subscriber's TV set, the satellite relay or other equipment beyond the control and not the responsibility of Grantee. Grantee shall not be charged with default hereunder for failures caused by storms, lightning, earthquakes, and other force majeure events. However, Grantee shall use its best efforts to recover and restore service as soon as possible in case of disruption from such causes. Where subscribers are without service due to force majeure for more than 24 hours, they shall receive an automatic credit for the period during which they did not receive service, which credit will be redeemed at the end of their subscription. If such disruption is not caused by force majeure, the subscriber may claim a *pro rata* rebate at Grantee's local office.

(5.4) Grantee shall extend its lines and provide cable TV service to one or more residents of the City in any locality where the Grantee's normal scheduled charge for installation of the cable and/or other equipment necessary to add that resident (or those residents) to Grantee's system is 75% or more of Grantee's actual out-of-pocket cost of such installation. Grantee may terminate the subscription of a subscriber who willfully destroys Grantee property or who cheats Grantee (e.g., by installing unauthorized equipment, etc.) or who fails and refuses to pay proper charges after first having received due notice. In addition, Grantee may pursue such other remedies as may be permitted by law in such cases.

(5.5) Grantee shall maintain accurate books and records of its Paragould operation covered by this Agreement (i.e., not consolidated with a parent or affiliate) such that the Grantee on reasonable written notice, can (and Grantee agrees to do so) make available to a responsible representative of Grantor, the books and records of Grantee pertaining to cash receipts of Grantee's Paragould operation. If requested, Grantee shall cooperate with the said responsible representative of the Grantor in reconciling with its said books and records the franchise payment by the Grantee to the Grantor which corresponds to the period for which the Grantee's records are made available.

(5.6) Grantee shall maintain an office in the City, with a telephone, at which bills may be paid, services may be requested, records and accounts will be kept, and complaints may be registered. Grantee will respond promptly to requests for service and to service complaints. The term "service complaints" refers to complaints relating to faulty TV reception by subscribers. Other complaints will be promptly investigated by Grantee, and the complaining party notified of the result of such investigation.

(5.7) Grantee's schedule of service charges in effect on the effective date of this Agreement shall be attached hereto (referring to this paragraph) and made a part hereof. The schedule shall include the charge for the basic program, various tiers of pay TV, and any other charges to subscribers for cable TV service. The schedule shall include charges for all classes of subscribers (e.g., residential, motel, etc.). Grantee agrees to keep charges reasonable, and will provide the City 60 days notice of a proposed change in the schedule. If the City considers a proposed change in charges unreasonable (for example, if the change is an increase and it more than covers the increase of Grantee's cost of doing business, Grantor might consider the change "unreasonable") Grantee agrees to enter into discussions with City representatives at City's

request concerning such proposed changes and when requested in writing by Grantor to furnish reasonable details which Grantee relies upon to justify such charges.

(5.8) Grantee's schedule for installation charges in effect on the effective date of this Agreement shall be attached hereto (referring to this paragraph) and made a part hereof. The schedule shall include all categories of installation charges to each class of subscribers (e.g., residential, business, institution, etc.) Grantee agrees that such charges shall be reasonable in comparison with out of pocket costs, and will provide the City 30 days notice of a proposed change in the schedule. If the City considers a proposed change unreasonable, Grantee agrees to enter into discussions with City representatives at City's request concerning the proposed changes.

(5.9) Grantee agrees to give subscribers notice in advance of the effective date of any change in its service, installation or other charges. Notice in writing by mail is the preferred method, but Grantee may use other methods if they can be shown to provide reasonable advance notice to a substantial majority of subscribers.

(5.10) Grantee shall pay the City within 30 days after 31 August 1984 and within 30 days after 31 August thereafter while this Agreement is in effect a franchise fee of 3% of Grantee's gross receipts from the sale of cable TV service (basic and all pay TV). The first payment (as of 31 August 1984) shall cover the period from 10 December 1983 to 31 August 1984, inclusive, and the succeeding payments except the last shall cover the period from 1 September to 31 August inclusive. The last payment shall cover the period from the "as of" date of the late payment actually made to the date of expiration or other termination of this Agreement. Each payment shall be supported by a brief financial statement showing gross receipts from the sale of cable TV service for the payment period, the number of subscribers at the end of the period

and the number at the midpoint of the period. The supporting financial statement shall also show the amount of installation charges collected, and the amount if any paid by Grantee during the pay period to the City Light and Water System.

(5.11) The Grantee shall give the City advance written notice of at least 15 days if it decides to abandon its cable TV system and at least 30 days if it contemplates sale, assignment, subleasing or other disposition of its Cable TV service or control thereof.

(a) In case of abandonment, Grantee shall make all details pertinent to its facilities and equipment and other property serving the City, including the existence and status of any indebtedness, liens, etc., known to the City. Grantee shall also advise the City of its intentions pertaining to removal, salvage, cannibalization or other disposition of property (personal and real), and the City shall have the right to require Grantee to transfer to the City all of Grantee's property which Grantee intends to abandon in consideration of the City's agreement not to require Grantee to remove installed personal property. Additionally, the City shall have the right to require Grantee to transfer to the City all or any part of the property Grantee intends to remove, salvage, cannibalize or otherwise dispose of by means other than abandonment upon such terms and arrangements as may be negotiated between the parties or as may be determined by an informal arbitration board of three persons, one designated by Grantee, another by the City and a third selected by the two designees.

(b) In case of disposition by means other than by abandonment, Grantee agrees to give the City the right of first refusal, and shall make known to the City all details of the proposed transaction with the third party. If the City should decide to acquire Grantee's cable TV system, or control thereof, pursuant to its right of first refusal,

Grantee agrees to provide City with at least 15 days instruction into the complete operation of the system and to assist the City in a smooth transition, without charge to the City. If the City does not decide to undertake such acquisition, Grantee shall not consummate the transfer to a third party without first giving the City an opportunity to assure itself of the competence and ability of the third party to operate the system. The City's acquiescence shall be in writing and may contain provisions binding on Grantee to guarantee performance by such third party. Such guarantee may at Grantee's option, take the form of an appropriate performance bond in an amount of not less than $100,000.00.

(5.12) Matters presented to Grantee through the Mayor's office as a result of the complaint procedure set forth in paragraph 6 below shall receive prompt attention by Grantee and Grantee shall respond thereto in writing within 10 days after receipt. If such response does not resolve the matter, the City may call for negotiation, and if either party does not consider that the negotiations have provided a satisfactory solution, the matter (or portions thereof) may be referred to informal arbitration for resolution, one arbitrator to be selected by Grantee, one by City and the third by the two selectees.

6. City's Operating Responsibilities

(6.1) The Mayor's office shall establish a Complaint Committee composed of two City officials and one of Grantee's subscribers (three individuals) to consider complaints pertaining to Grantee's cable TV System, its operation, service, charges, etc. Such complaints may be lodged with the City Clerk and will be referred to the Complaint Committee promptly by the City Clerk. The Committee may act on the complaint as filed, and in any event will refer it to Grantee if the complaining party has not previously given Grantee a chance to resolve the matter. The Committee may request the complaining

party (parties) to come to a Committee meeting and furnish additional details. The Committee may invite a representative of Grantee to participate in the information-gathering phase of any complaint. The Committee shall work informally with Grantee's representatives to try to resolve a complaint, but may also refer the matter in writing and in reasonable detail to the Mayor's office for formal presentation to the Grantee.

(6.2) The Mayor shall designate one or more members of the City Council to function as a committee to oversee (called the TV Oversight Committee) the administration of this Agreement. The Mayor shall designate the City Clerk to administer this Agreement on behalf of the City. Such administration shall include the keeping of the official copy of this Agreement, including all amendments, to receive and give all written notices hereunder, to keep track of all dates, deadlines, etc. herein provided for and to advise the Oversight Committee and the Mayor of Notices received from Grantee, of approaching deadlines, events, etc. which may require action hereunder.

7. Compliance with Applicable Laws and Regulations

(7.1) Grantee shall advise the City promptly if compliance with any law or regulation, in Grantee's opinion, affects this Agreement and in such advice shall identify the law or regulation (furnishing a copy if possible) and shall describe the portions Grantee believes will be (or are) affected. After a reasonable time for consideration by the City, the matter shall be resolved by discussions between the parties and, if required, by written modification of this Agreement.

(7.2) The performance by the Grantee hereunder is subject to limitations, restrictions, or requirements now existing or which may henceforth be imposed by law, rules or order of the F.C.C. or of any other government board, commission or agency in the proper exercise of public authority. The Grantee shall not be deemed in

breach of any of the requirements of this Agreement to the extent it performs in accordance with, or refrains from doing anything prohibited by, such law, rule or order.

(7.3) Should the F.C.C. modify or amend the provisions of 76.31 of its Rules and Regulations entitled "Franchise Standards," such modifications or amendments shall be incorporated into this Franchise Agreement when required by the F.C.C. Rules and Regulations or at the time of the exercise of an option by the Grantee for extension of the Agreement, whichever first occurs.

8. Disputes

(8.1) If a dispute should arise under this agreement which cannot be settled by negotiation between the authorized representatives of the parties, either party may notify the other in writing that the matter shall be referred to arbitration. The initiating party will select one arbiter for whose compensation that party will be responsible. This selection will be made known to the other in the initial notification. The recipient of the original notice shall nominate a second arbiter for whose compensation that party will be responsible and will notify in writing the other party of this selection within five business days. After both arbiters have been selected, they shall have ten business days to select a third arbiter whose compensation shall be divided equally between the parties. The three arbiters shall constitute an arbitration board for resolution of the dispute. The arbitration board shall ask each party for its version of the dispute and germane facts. Each party shall have ten days within which to provide in writing its version of the facts, and its position in the dispute. The arbitration board may conduct its own investigation in which event each party is bound to fully cooperate in the investigation. The arbitration board shall announce its decision in the dispute as expeditiously as is reasonably possible. With the exception of disputes in-

volving the fair and reasonable charges hereunder, the parties shall be bound by the decision of the arbitration board. With regard to any dispute involving the issue of fair and reasonable charges, the decision of the arbitration board shall constitute nonbinding arbitration.

IN WITNESS WHEREOF, the parties hereunto have caused this agreement to be duly executed this 28th day of November, 1983.

/s/ William C. Henchy
W. C. HENCHY
President
Paragould Cablevision

ATTEST:

/s/ Kenneth F. Burnes
Secretary

Seal

/s/ Charles R. Partlow
CHARLES R. PARTLOW
Mayor
Paragould, Arkansas

ATTEST:

/s/ Goldie Wise
City Clerk

Seal

RESOLUTION NO. 83-22

RESOLUTION AUTHORIZING THE MAYOR AND THE CITY CLERK TO EXECUTE CERTAIN CABLE TV FRANCHISE AGREEMENT WITH PARAGOULD CABLEVISION, INC.

WHEREAS, the present Ordinance governing the Cable TV franchise in favor of Paragould Cablevision, Inc. will expire on December 10, 1983; and,

WHEREAS, the City Council desires to continue Cable TV services within the City of Paragould, Arkansas.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL FOR THE CITY OF PARAGOULD, ARKANSAS, as follows:

SECTION I: That the City Council has considered the Cable TV Franchise Agreement recommended to the City of Paragould, Arkansas, by the Cable TV Committee comprised of Don Perky, Fred Wulfekuhler and Phil Herget. The Council finds the proposed Agreement to be acceptable and hereby directs and authorizes the Mayor of the City of Paragould, Arkansas, to execute on behalf of the City the Cable TV Franchise Agreement which is attached hereto and incorporated by reference herein as if set out word for word.

SECTION II: That the Mayor is hereby directed to take appropriate steps to transmit the executed copy of the Franchise Agreement to Paragould Cablevision, Inc. for execution.

PASSED AND APPROVED this 28th day of November, 1983.

CITY OF PARAGOULD,
ARKANSAS

By: /s/ Charles R. Partlow
Mayor

ATTEST:

/s/ Goldie Wise
City Clerk

PARAGOULD CABLEVISION, INC.

CLERK'S CERTIFICATE

The undersigned, Kenneth F. Burnes, hereby certifies that he is the duly elected and acting Clerk of Paragould Cablevision, Inc., that the following resolutions were duly adopted by the Board of Directors of Paragould Cablevision, Inc. by a Unanimous Written-Consent dated December 28th, 1983 and that such resolutions have not been amended or rescinded and remain in full force and effect:

RESOLVED:

That this Corporation renew its cable franchise for Paragould, Arkansas and that William C. Henchy, President of this Corporation, is hereby authorized to execute and deliver on behalf of this Corporation a renewal of franchise agreement with the appropriate cable authority upon terms and conditions satisfactory to the executing officer, the signature of Mr. Hench thereon to be conclusive evidence of the approval thereof by this Board as so executed.

FURTHER RESOLVED:

That in connection with the renewal of the cable franchise with Paragould, Arkansas, any officer of this Corporation be and each acting singly is hereby authorized to execute and deliver on behalf of this Corporation such other documents and take such other action as any of them shall determine to be necessary or desirable.

Witness my hand and the seal of Paragould Cablevision, Inc. this 28th day of December, 1983.

/s/ Kenneth F. Burnes
Clerk

CABLE TELEVISION FRANCHISE AGREEMENT

WHEREAS, Paragould Light and Water Commission (hereinafter the "Commission" or "Grantee"), a light and water commission created by the City of Paragould, Arkansas pursuant to the laws of the State of Arkansas, desires to construct a broadband communications system within the limits of the City of Paragould, which system would be used to provide both utility related communications and cable television services;

WHEREAS, by referendum conducted on June 17, 1986, the public approved Ordinance 86-3 (hereinafter "Ordinance") authorizing the construction and operation of a cable television system by the Commission;

WHEREAS, by Resolution No. 88-10 of June 6, 1988 the City Council of the City of Paragould directed the Commission to undertake the necessary steps toward the construction and operation of a cable system;

WHEREAS, the Mayor of the City of Paragould, Arkansas, has been authorized by Resolution No. 89-1, to enter into this Agreement with the Commission.

NOW THEREFORE, the City of Paragould (hereinafter the "City" or "Grantor") and the Commission agree as follows:

1. Grant of Franchise

(1.1) Subject to compliance by Grantee with its obligations under the Ordinance and this Agreement, the Grantor hereby grants to the Grantee a non-exclusive franchise to install and operate a broadband cable communications system throughout the entire City, including during the term hereof any areas now outside the City which may be subsequently annexed, and to provide cable service within the authorized area. This franchise includes the right to install cable and other system hardware in, upon, along, over and under the City's streets,

avenues and other public rights-of-way, subject to the provisions of this Agreement. To the extent otherwise permitted by law, Grantee may extend its cable communications system beyond the City boundaries.

(1.11) Grantee shall utilize existing light, power, or telephone poles whenever economically and technically feasible.

(1.12) Before the Grantee erects any new poles or makes any other installation upon City owned or controlled property, the Grantee shall obtain a permit from the City Inspector and shall coordinate the work with any utility whose lines may be affected. Any pavements, sidewalks, curbing, or other installed improvement taken up and any and all excavations made by Grantee shall be done in such manner as to give the least inconvenience to the inhabitants of the City and the public generally. The work shall be completed with all convenient speed and the premises restored to at least the condition existing before the work was undertaken, all at the expense of the Grantee. The Grantee shall retain complete records and make "as installed" maps showing the location of its facilities in the City, with a copy of the maps furnished to the City. The Grantee shall not place poles or other fixtures where they will interfere with existing utility lines and installations.

2. Effective Date, Term and Renewal

(2.1) This Agreement shall take effect on January 16, 1989 and shall continue in full force and effect for a period of fifteen (15) years thereafter; provided, however, there shall be a review of the terms hereof and of the Grantee's performance hereunder at the end of the first five year period. Such review shall determine whether:

(a) Grantee's charges to subscribers are sufficient to cover its costs pursuant to Section 5.1 hereof;

(b) Grantee is providing cable service to all residents of the City who desire such service;

(c) The nature and/or quality of Grantee's service is adequate if a substantial number of credible complaints relating hereto have been received;

(d) The Grantee's handling of complaints, changes, or charges or other interfaces with subscribers is satisfactory; and

(e) The City has complied with the terms of this Agreement in a timely, businesslike manner.

As a result of such review, the above matters may become subject to negotiation and any problems subject to resolution by agreement incorporated herein by written amendment.

(2.2) This Agreement is subject to the requirements of the Ordinance and the Cable Communications Act of 1984, 47 U.S.C. § 521 *et seq.* ("Cable Act"), and covers the provision of "cable service" as that term is defined in the Cable Act. This Agreement does not preclude Grantee's use of its broadband system for the provision of non-cable services over its broadband facility, provided that such use is consistent with state and federal law and related rules and regulations.

3. Indemnification and Insurance

(3.1) Grantee shall indemnify and save the City harmless from all loses sustained by the City on account of any claim or demand, whether litigated or not, arising out of the operation and maintenance of Grantee's system covered by this Agreement. Grantor shall notify the Grantee promptly but in no event later than 30 days after the presentation of any claim or demand made against the Grantor which is indemnified hereinafter. The indemnification provided by the Grantee hereunder shall include reasonable attorney's fees.

(3.2) Grantee shall carry liability insurance relative to its cable television business covering property damage in an amount not less than $500,000 and covering personal injury in an amount not less than $1,000,000 as to any one person, and not less than $3,000,000 as to any one accident. Such coverage shall apply to all of Grantee's operations including its vehicles, and shall be written by a reputable insurance company authorized to do business in the State of Arkansas. Grantee shall keep on file with the City Clerk a certificate showing that such coverage has been obtained and is current. If Grantee employs contractors or subcontractors, it shall require adequate liability insurance to be carried by them during their employment by Grantee. Certificates furnished to the City Clerk shall include a statement from the insurer that in event of cancellation or other termination, the insurer shall promptly notify the City Clerk in writing.

4. Miscellaneous Provisions

(4.1) The City understands that Grantee will promulgate reasonable rules and regulations applicable to its subscribers which are necessary to enable Grantee to exercise its rights and perform its services under this franchise and to provide uninterrupted service to its customers.

(4.2) Grantee recognizes that the City has the right of reasonable regulation of the erection, construction and/or installation of facilities by Grantee, including regulation of the location of such facilities of Grantee to be placed on property belonging to or under the control of the City.

(4.3) Grantee shall, upon the request of any person holding a permit from the City for moving a building or other outsize load, temporarily raise or lower its wires to permit the passage of the load, provided the Grantee is given no less than 48 hours notice to arrange for such passage. The expense of such arrangement shall be borne by the party moving the outsize load, and the Grantee may request payment in advance.

(4.4) The Grantee shall have authority to trim trees which overhang streets, sidewalks and other public ways when such trimming is necessary to prevent interference with Grantee's wires and cables. Such trimming shall be subject to the supervision of an authorized representative of the City, but at Grantee's expense.

(4.5) If, during the time this Agreement is in effect, the City lawfully alters any street, sidewalk or other public way such that Grantee's poles, wires or other fixtures and equipment are affected, the Grantee, upon reasonable notice from the City, shall make such adjustments in its poles, wires or other fixtures and equipment as may be necessary (including but not limited to removal and relocation) at Grantee's expense.

(4.6) Nothing in this Agreement shall exempt or exclude Grantee from application of the City's police power or from the application of lawful City ordinances.

(4.7) The terms used herein shall be defined consistent with the use of those terms in the Cable Act and, if not so used, as those terms are ordinarily used in the context of cable television service.

5. Operation and Maintenance of the Cable TV System

(5.1) To provide cable service hereunder, Grantee shall establish a new department which shall have as its sole function the provision of cable service. The cable department shall maintain its own separate books of account and shall share common costs with Grantee's utility operations on a reasonably allocated basis so as to ensure that the costs of providing cable service are not subsidized by utility rate payers. The cable department may lease capacity from Grantee's broadband communications system provided that the cable department pays its reasonably allocated share of such system's total cost. If the cable department performs installation and/or maintenance services relative to the broadband system which is

used for both cable services and other communications services, such installation or maintenance services shall be covered by contract negotiated on "arm's length" basis and shall reflect a reasonable allocation of costs as between cable service related costs and other costs.

(5.2) Grantee shall provide to its cable subscribers a basic service of not less than eleven (11) channels. All cable programming carried shall be selected by the Citizen's Cable Television Advisory Committee ("Committee") as established pursuant to Section 6 of the Ordinance. Grantee shall have the authority to establish the number and type of channels to be carried and reasonable cost limits applicable thereto.

(5.3) Grantee shall have the authority to provide subscribers with services in addition to basic service. All programming services shall be selected by the Committee as provided in Section 5.2.

(5.4) The quality, both visual and aural, of cable service shall meet minimum Federal Communications Commission ("FCC") recommended technical standards and be essentially the same as if the subscriber were located in the normal viewing area of the original broadcast, subject only to such degradation as may be caused by the subscriber's TV set, satellite relay or other facilities beyond the control and not the responsibility of Grantee. Grantee shall not be charged with default hereunder for failures caused by storms, lighting, earthquakes, and other force majeure events. However, Grantee shall use its best efforts to recover and restore service as soon as possible in case of disruption from such causes. Where subscribers are without service due to force majeure events for more than 24 hours, they shall receive an automatic credit for the period during which they did not receive service, which credit will be redeemed at the end of their subscription. If such disruption is not caused by force majeure, the subscriber may claim a *pro rata* rebate at Grantee's local office.

(5.5) Grantee shall extend its lines and provide cable service to one or more residents of the City in any locality where the Grantee's normal schedule charge for installation of the cable and/or other equipment necessary to add that resident (or those residents) to Grantee's system is seventy-five percent (75%) or more of Grantee's actual out-of-pocket cost of such installation. Grantee may terminate the subscription of a subscriber who willfully destroys Grantee property or who defrauds or attempts to defraud Grantee (*e.g.*, by installing unauthorized equipment, etc.) or who fails and refuses to pay proper charges after first having received due notice. In addition, Grantee may pursue such other remedies as may be permitted by law in such case.

(5.6) Grantee shall maintain accurate books and records of its cable operations covered by this Agreement, and Grantee agrees to make available such books and records relative to its cable operation to a responsible representative of Grantor upon request. If requested, Grantee shall cooperate with the said representative in reconciling said books and records with the franchise payment made by the Grantee and the requirements of this Agreement.

(5.7) Grantee shall maintain a cable office in the City, with a telephone, at which bills may be paid, services may be requested, records and accounts will be kept, and complaints may be registered. Grantee will respond promptly to requests for service and to service complaints. The term "service complaints" refers to complaints relating to faulty cable reception by subscribers. Other complaints will be promptly investigated by Grantee, and the complaining party notified of the result of such investigation.

(5.8) Grantee agrees to give subscribers notice in advance of the effective date of any change in its service, installation or other charges. Notice in writing by mail is the preferred method, but Grantee may use other meth-

ods if they can be shown to provide advance notice to a substantial majority of subscribers.

(5.9) Grantee shall pay the City within 30 days of 31 August 1989 and within 30 days after each 31 August thereafter while this Agreement is in effect a franchise fee of three percent (3%) of Grantee's gross receipts from the sale of cable service (basic service and all other pay tiers) within the City. The first payment (as of 31 August 1989) shall cover the period from the date of this Agreement to 31 August 1989, inclusive, and the succeeding payments except the last shall cover the period from 1 September to 31 August inclusive. The last payment shall cover the period from the "as of" date of the last payment actually made to the date of expiration or other termination of this Agreemnt. Each payment shall be supported by a brief financial statement showing gross receipts from the sale of cable service for the payment period, the number of subscribers at the end of the period and the number at the midpoint of the period. The supporting financial statement shall also show the amount of installation charges collected.

(5.10) The Grantee shall give the City advance written notice of at least 15 days if it decides to abandon its broadband system and at least 10 days if it contemplates sale, assignment, subleasing or other disposition of its cable service or control thereof.

(a) In case of abandonment, Grantee shall make all details pertinent to its facilities and equipment and other property serving the City, including the existence and status of any indebtedness, liens, etc., known to the City. Grantee shall also advise the City of its intentions pertaining to removal, salvage, cannibalization or other disposition of its cable facility other than for the disposition of depreciated, obsolete or other property disposed of in the ordinary course of business, and the City shall have the right to require Grantee to transfer to the City all such property which Grantee intends to abandon in consideration of the City's agreement not to require Grantee

to remove installed personal property. Additionally, the City shall have the right to require Grantee to transfer to the City all or part of any such property Grantee intends to remove, salvage, cannibalize or otherwise dispose of by means other than abandonment upon such terms and arrangements as may be negotiated between the parties or as may be determined by an informal arbitration board of three persons, one designated by Grantee, another by the City and a third selected by the two designees.

(b) In case of disposition of its cable facility by means other than by abandonment, Grantee agrees to give the City the right of first refusal, and shall make known to the City all details of the proposed transaction with the third party. If the City should decide to acquire Grantee's cable facility pursuant to its right of first refusal, Grantee agrees to provide City with at least 15 days instruction on the operation of the system and to assist the City in a smooth transition, without charge to the City. If the City does not decide to undertake such acquisition, Grantee shall not consummate the transfer to a third party without first giving the City an opportunity to assure itself of the competence and ability of the third party to operate the system. The City's acquiescence shall be in writing and may contain provisions binding on Grantee to guarantee performance by such third party. Such guarantee may at Grantee's option, take the form of an appropriate performance bond in an amount not less than $100,000.00.

(5.11) Grantee shall establish its internal procedures for dealing with subscriber complaints. However, subscribers shall have the right to present complaints to the City as provided for in Section 6.1. Matters presented to Grantee through the Mayor's office as a result of the complaint procedure set forth in paragraph 6 below shall receive prompt attention by Grantee and Grantee shall respond thereto in writing within 10 days after receipt.

If such response does not resolve the matter, the City may call for negotiation, and if either party does not consider that the negotiations have provided a satisfactory solution, the matter (or portions thereof) may be referred to informal arbitration for resolution, one arbitrator to be selected by Grantee, one by City and the third by the two selectees.

6. City's Responsibilities

(6.1) The Mayor's office shall establish a Complaint Committee composed of two City officials and one of Grantee's subscribers (three individuals) to consider complaints pertaining to Grantee's cable service, its operation, charges, etc. Complaints may be lodged with the City Clerk and will be referred to the Complaint Committee promptly by the City Clerk. The Committee may act on the complaint as filed, but will refer it to Grantee if the complaining party has not previously given Grantee a chance to resolve the matter. The Committee may request a complaining party to furnish additional details. The Committee may invite a representative of Grantee to participate in the formation-gathering phase of any complaint. The Committee shall work informally with Grantee's representatives to try to resolve a complaint, but may also refer the matter in writing and in reasonable detail to the Mayor's office for formal presentation to the Grantee.

(6.2) The Mayor shall designate one or more members of the City Council to function as a committe to oversee (called the TV Oversight Committee) the administration of this Agreement. The Mayor shall designate the City Clerk to administer this Agreement on behalf of the City. Such administration shall include the keeping of the official copy of this Agreement, including all amendments, to receive and give all written notices hereunder, to monitor all dates, deadlines, etc. herein provided for and to advise the oversight Committee and the Mayor of Notices

received from Grantee, of approaching deadlines, events, etc. which may require action hereunder.

7. Compliance with Applicable Laws and Regulations

(7.1) Grantee shall advise the City promptly if compliance with any law or regulation, in Grantee's opinion, affects this Agreement and in such advice shall identify the law or regulation (furnishing a copy if possible) and shall describe the portions Grantee believes will be (or are) affected. After a reasonable time for consideration by the City, the matter shall be resolved by discussions between the parties and, if required, by written modification of this Agreement.

(7.2) The performance by the Grantee hereunder is subject to limitations, restrictions, or requirements now existing or which may henceforth be imposed by law, rules or order of the FCC or of any other government board, commission or agency in the proper exercise of authority. The Grantee shall not be deemed in breach of any of the requirements of this Agreement to the extent it performs in accordance with, or refrains from doing anything prohibited by, such law, rule or order.

(7.3) Should the Congress amend the Cable Act or the FCC its rules and such amendment requires modification of this Agreement to come into compliance therewith, the parties shall negotiate and execute an appropriate amendment to this Agreement.

8. Disputes

(8.1) If a dispute should arise under this Agreement which cannot be settled by negotiation between the parties, either party may notify the other in writing that the matter shall be referred to arbitration, in such notification nominating one arbiter. Within five (5) business days the recipient of such notice shall nominate a second arbiter, advising the other party in writing. Within 10 days the two arbiters shall select a third, and the three

shall constitute an arbitration board for resolution of the dispute. The board shall ask each party for its version of the dispute and the germane facts, and the board may conduct its own investigation in which each party is bound to cooperate. The board shall announce its decision in the dispute with all due dispatch and the parties shall be bound thereby to the extent that such decision does not violate any law or lawful regulation and to the extent it is within the municipal authority of the City.

Supreme Court, U.S.
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No. 91-469

In The

Supreme Court of the United States

October Term, 1991

PARAGOULD CABLEVISION, INC.,

Petitioner,

vs.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF PARAGOULD

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No. 91-469

In The

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October Term, 1991

PARAGOULD CABLEVISION, INC.,

Petitioner,

vs.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF PARAGOULD

STATEMENT OF THE CASE

For many years prior to this litigation, the petitioner operated, as a monopolist, a cable television service in Paragould, Arkansas. This operation has been pursuant to Franchise Agreements the

last of which was a non-exclusive Franchise Agreement negotiated and executed by the parties on November 28, 1983.

Because of extensive and widespread dissatisfaction with the operation of the cable television system and the resulting pressure from the citizens, the Paragould City Council passed Resolution 86-3 calling a special election on the question of authorizing the Paragould Light and Water Commission to construct and operate a municipal cable television system. At the special election, on June 17, 1986, 79% of the voters approved the measure.

The City Council subsequently called a special election on the question of the issuance of 3.2 million dollars of capital improvement bonds for the construction of the municipal cable television system. These bonds were secured by a property tax feature within their terms. Even after an extremely negative campaign by the petitioner, the measure passed, and the City set on its agenda for January 22, 1989; the consideration of the passage of an ordinance for the issuance of the capital improvement bonds.

On January 18, 1989, in a clear effort to frustrate the marketing of the City's capital improvement bonds, the petitioner began filing its lawsuits.

In the first action, the petitioner attempted to enjoin the issuance of the capital improvement bonds that would enable the City to acquire its system. It was unsuccessful. *Paragould Cablevision, Inc. v. City of Paragould*, 305 Ark. 476 (1991). A second state lawsuit was filed and just recently withdrawn by the petitioner.

The present litigation was filed on January 29, 1989, before the construction of the City cable system was begun. The allegations were couched in terms of "information and belief"

and other speculatory allegations. Both the United States District Court and the Eighth Circuit Court of Appeals expressed skepticism as to the existence of even a justiciable issue.

The petitioner began this litigation by attempting to prevent the City from entering the market place, specifically asking the District Court to "permanently enjoin from construction and operation a cable television system." However, for the purpose of this petition for certiorari, Cablevision now takes an opposite position stating:

> Cablevision does not contend that the decision of the City and CLW to enter to the cable television business violates the anti-trust laws.

(Petition, p. 14).

Cablevision will apparently change its position and say virtually anything that it perceives will accomplish its objectives.

All of the pleadings and briefs of the petitioner in the various cases have been couched in terms of the most outrageous allegations. That pattern continues in this petition. The petitioner alleges that the City is involved in renegade behavior which is simply not true.

The petitioner also alleges that if it is not permitted to proceed with this litigation the community will have no local speaker. Cablevision does not tell the Court that Paragould is served by a city newspaper, a regional newspaper, and two newspapers of state-wide circulation. Paragould has two licensed radio stations, and separate and apart from any cable system, the City is served by a regional television station less than 18 miles from its corporate limits. The factual allegations of the petitioner are specious and totally unmeritorious.

Since January of 1989, it has become apparent that the petitioner has utilized litigation as a weapon in its attempt to prevent the City from the implementation of Arkansas Act 328 of 1987. Further, as opposed to a forum to resolve legitimate disputes, the petitioner has, as monopolist, attempted to utilize the Sherman Act in a perverse manner to frustrate or cripple the City as a competitor.

SUMMARY OF ARGUMENT

The petitioner began this litigation by asking the District Court to enjoin the construction and operation of the Paragould television cable system. Having failed to foreclose Paragould's market entry, it now denies it ever contended otherwise. Cablevision now argues that the Court of Appeals misconstrued the intent of the Arkansas Legislature in the passage of Act 328 of 1987.

The Court of Appeals, however, reviewed Act 328 of 1987 and correctly found that the application of the act necessarily results in the displacement of competition. Its further application of *Parker v. Brown* and its progeny makes finding for the respondents apparent.

The petitioner's First Amendment assertions presuppose the application of an unlawful "media tax." The contractual provisions that give rise to this argument are not tax questions and do not have the effect of regulating speech of any kind. Nor do these contractual provisions constitute a deliberate or calculated device to penalize the petitioner. Assertions of waiver by the petitioner are not supported by a constitutional issue.

REASONS FOR DENYING THE WRIT

I.

The respondent City is immune from federal anti-trust liability because the foreseeable result of the implementation of Act 328 of 1987 will restrict competition.

The petition for writ of certiorari fails to demonstrate any basis for the Supreme Court to reverse its long line of authority establishing the concept of state action immunity.

As the Court of Appeals noted, the law applicable in this case results from a series of cases culminating in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In that case, the Supreme Court determined that if a municipality is engaged in an activity pursuant to clearly expressed state policy, it enjoys the protection of state action immunity. The Supreme Court has also made it clear that a specified and detailed legislative authorization of monopoly need not exist to establish the necessary state intent. *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978). This line of authority has been followed consistently in the Eighth Circuit. *Scott v. City of Sioux City*, 736 F.2d 1207 (1984), *cert. denied*, 471 U.S. 1003 (1985); *Golden Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (1983) and *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517 (1985).

Based upon this authority, municipalities are immune from anti-trust liability where restriction of competition is a foreseeable result of implementing that action authorized by state law. It then becomes a simple matter to determine whether restriction of competition is a foreseeable result from the application of Arkansas Act 328 of 1987. The relevant statutes provide as follows:

A.C.A. 14-199-601. Authority of municipalities generally — Nonliable.

(a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting, end distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

(b) In no case shall a city of town be held liable for damages Ark. Code Ann. § 14-199-601 (Supp. 1989).

A.C.A. 14-199-602. Appliances, fixtures, and equipment authorized.

The city or town may erect, construct, operate, repair, and maintain in, upon, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guywires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with television signal distribution system.

See also, Ark. Code Ann. §§ 14-199-303 & 309 (1987), which authorize municipalities to issue capital improvement bonds.

The District Court described the terms of the above grant of authority as broad, sweeping and comprehensive.

The Court of Appeals agreed pointing out the following:.

> Arkansas has clearly authorized municipalities to enter into the cable television business. . . . Municipalities generally enjoy access to extant governmental infrastructure such as utility poles and rights of way. When a municipality, such as Paragould or its entity, the CLW, enters into the cable market, it necessarily will benefit from this access. Thus, by virtue of their status, Paragould and the CLW do not have to build their cable television operations from scratch. Presumably, rent-free office space is available, employees and "executives" are already hired and presently serving in other capacities, trucks and equipment to service cable needs are available, demographic information has been compiled and computerized, rights of way have been secured for other purposes, and utility poles are already standing. If the Arkansas legislature did not intend the utilization of these resources and the resultant benefit of being able to supply cable services with diminished overhead costs, it would have tailored the enabling statutes accordingly. Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorized municipalities to enter into an industry with monopolistic tendencies.

The petitioner has never offered at any stage in this process any reasonable argument to the contrary. There are other considerations to determine the legislative intent.

Prior to 1971, the State of Arkansas was a traditional Dillon Rule state, and therefore, Arkansas municipalities had no inherent

power except that given by the state or necessarily implied from expressed powers. In 1971, that changed, however, and the Arkansas Legislature passed legislation commonly referred to as the Arkansas Home Rule Statute. Ark. Code Ann. § 14-43-602. It provides as follows:

> Any city of the first class is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs including, but not limited to, the power to tax.

In the 1971 Session of the Arkansas Legislature, the public policy regarding the authority of local governments to address the needs of their citizens was specifically addressed. Act 266 of 1971 provided as follows:

> Where it is found and declared that numerous and pressing needs of Arkansas municipalities are, because of their urgency, creating burdens on the General Assembly due to the requirements that the General Assembly examine each individual problem and authorize each specific power to municipalities, according to the provisions of the so called Dillon Rule, which requires an express grant of authority to a municipality by the General Assembly, and which Rule is now considered obsolete and should be repealed immediately . . .

If there was any doubt as to the announced public policy of the State Legislature from that point forward, it was laid to rest by the passage of Act 537 of 1971 which specifically provided as follows:

> It is hereby found and determined by the General Assembly that Act 266 of 1971 was intended to

> grant broad authority to cities of the first class to exercise functions or legislative powers pertained to the local municipal affairs of the city . . .

After 1971, it is readily apparent from an examination of Act 266 of 1971 that the City of Paragould, Arkansas, could have created its cable system without the benefit of any specific legislation or specific state policy such as Act 328 of 1987. Therefore, until Act 328, the State of Arkansas was "neutral" as concerns the providing of this particular public service. By the passage of Act 328 of 1987 and Act 28 of 1988, the State of Arkansas abandoned its "neutrality" and by broad and sweeping language specifically authorized cities such as Paragould to offer cable television service. A cursory examination of that Act demonstrates the extent of the grant of authority. It even permits municipalities to exceed a distance of two miles outside its boundary to provide that service, and it insulates them from liability for damages.

The clear intent of the Arkansas Legislature was to enable cities of the first class such as Paragould to provide this service for its citizens, and the necessary result of providing this authority, as the Court of Appeals has stated, has the effect of displacing competition. It seems, therefore, to this respondent that unless the Supreme Court is in a position to reverse its long standing position that cities are immune from anti-trust liability where the restriction of competition is a foreseeable result of implementing state law, this petition for certiorari has no merit. The petitioner should be left to those state remedies available, and the Sherman Act simply has no application.

II.

Assertions of waiver by the petition are not supported by a constitutional issue.

As regards Cablevision's constitutional allegation, the petition for certiorari is substantially different from the relief sought in its complaint.

On November 28, 1983, the petitioner negotiated with the City of Paragould, Arkansas, a non-exclusive Franchise Agreement. As a part of that contract, the parties negotiated the following agreement in paragraph 2.4:

> This Agreement does not cover major technical advances in TV reception and use, in cable TV or TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of Grantee such as advertising over Grantee's cable TV system. If Grantee should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities and the proposed modification shall be subject to negotiation. The parties recognize that services involving use of such advanced technology must be offered by others (e.g. the telephone company) and that the offering of such services may not require a franchise agreement or a Modification of this Agreement. The parties also recognize that

> such advanced technology may make cable TV as contemplated by this Agreement obsolete or virtually certain to be unprofitable to the operator. Upon the practical advent of any such technical advance, either party may propose that this Agreement be opened for further negotiation and modification so that each party may better protect its interests.

The non-exclusive Franchise Agreement also provided in Paragraph 5.10 that the cable operator would pay a 3% franchise fee on gross receipts.

In its complaint, the petitioner suggests that it desires to advertise and that the City has taken the position that the revenues generated from advertisement should be included in the franchise fee calculation. The City's position, therefore, constitutes a "media tax" in violation of the First Amendment.

The District Court found no merit in this allegation and described it variously as nonexistent, frivolous, end lacking jurisdiction. The court found that the purpose of Section 2.4 was to anticipate contractual contingencies for the protection of the parties, and that the covenant did not outlaw or curb advertisement within the meaning of the First Amendment. The court stated as follows:

> At most it could be characterized as a mechanism for mutual regulation of an agreement which infringes on speech rights to the same extent as it prevents the advent of technological changes in Paragould; that is to say, not at all. In short, this provision is contractual in nature and does not seek, nor have the effect of regulating speech of any kind.

> Contractual modifications do not automatically become tax questions merely because one party is a political subdivision with taxing authority and, as found above, the provisions of 2.4 do not inhibit speech.

The Eighth Circuit Court of Appeals accepted the District Court's analysis and agreed that the provision was contractual in nature.

As concerns the allegation of a "discriminatory media tax," the District Court pointed out that Paragould has not extracted any sort of advertising fee nor has Cablevision submitted any convincing evidence to support the imminency of such a fee. Therefore, a justiciable controversy was lacking. The Court of Appeals added the following to this observation:

> Cablevision voluntarily entered into the Franchise Agreement presumably for its own economic gain. The forum for protecting its free speech rights was the bargaining table, not the courtroom seven years later.

The petitioner has changed its allegation in preparing this petition. It no longer alleges the application of the franchise fee to advertising revenue being a media tax. The respondent suspects that the reason the petitioner now has abandoned this position is because of the impact of *Leathers v. Medlock*, 111 S. Ct. Rep. 1438 (1991). The thrust of that case is that in order to be actionable the "media tax" must resemble a penalty for particular ideas or speakers, or must discriminate based on ideas. It must in effect be a deliberate and calculated device to penalize a claimant.

Before the analysis can ever reach the stage of a waiver as asserted by the petitioner, there must be the underlying assumption

that there was a discriminatory tax in existence. The petitioner brushes over this requirement and assumes away the critical consideration.

Section 2.4 of the non-exclusive Franchise Agreement entered into in 1983 simply cannot reasonably be interpreted to be a deliberate and calculated device to penalize the petitioner.

It should also be noted that the Federal Cable Act provides that a franchise fee can be figured on the "cable operators' gross revenue derived . . . from the operation of the cable system." 47 U.S.C.S. § 542(b). By this broad language, the Congress apparently intended that not only advertising revenue but all revenue derived from the operation of a system is subject to the application of the 5% franchise fee. Therefore, to grant this petition and reverse the Court of Appeals on this question would have the effect of grafting a case law exception for advertising revenue to the "gross revenue derived" language in the Federal Cable Act.

As found by the District Court and the Court of Appeals, the petitioner's constitutional claims are meritless, premature, frivolous, and lacking in a justicible controversy.

CONCLUSION

It is apparent from a reading of the opinion of the Eighth Circuit Court of Appeals that the issues addressed by the opinion are straightforward and appropriately considered by the court and do not constitute sufficient importance for this Court to entertain the petitioner's writ of certiorari.

Respectfully submitted,

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City of Paragould

MOTION FILED
OCT 15 1991

91-469

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF WARNER CABLE COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

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October 15, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-4659

PARAGOULD CABLEVSION, INC.,

Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION OF WARNER CABLE COMMUNICATIONS INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, *Amicus Curiae* Warner Cable Communications Inc. ("Warner Cable") hereby moves this Court for leave to file the attached Brief *Amicus Curiae* in support of Petitioner Paragould Cablevision, Inc. ("Cablevision"). This motion is necessary because one of the parties, City of Paragould, has refused to provide this *amicus* with written consent to file a Brief *Amicus Curiae*, and because of certain time constraints counsel for another party, The Paragould Light and Water Commission, was unable to affirmatively grant or deny its consent prior to the filing deadline.

Warner Cable is wholly owned by Warner Communications Inc., a wholly-owned subsidiary of Time Warner Inc. Warner Cable owns and operates over 122 cable television systems throughout the United States, which combined serve approximately 1.6 million subscribers.

The issues raised by Paragould's petition are of great concern to Warner Cable and this *amicus* supports Paragould's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Despite a formal request by counsel for this *amicus* to obtain written consent from Cablevision, City of Paragould, and The Paragould Light and Water Commission, and despite Cablevision having given its written consent, which is being filed with the Clerk, City of Paragould has formally refused to give written consent to this *amicus* to file a Brief *Amicus Curiae*. Counsel for The Paragould Light and Water Commission was unable to affirmatively grant or deny its consent.

WHEREFORE, Warner Cable respectfully requests that this Court allow it to file a Brief *Amicus Curiae* in support of Paragould's petition.

Respectfully submitted,

/s/ R. Bruce Beckner
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October 15, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-465

PARAGOULD CABLEVISION, INC.,

Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF WARNER CABLE COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Warner Cable Communications Inc. ("Warner Cable") submits this Brief *Amicus Curiae* in support of Paragould Cablevision, Inc. ("Cablevision"), petitioner for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Warner Cable is wholly owned by Warner Communications Inc., a wholly-owned subsidiary of Time Warner Inc. Warner Cable owns and operates cable television systems in 22 states, providing cable television ser-

vice to approximately 1.6 million subscribers. Warner Cable operates systems in large metropolitan areas as well as in small cities and towns. Presently, Warner Cable has four cable television systems threatened with pending municipal overbuild activity, and it has previously litigated related issues in a municipal overbuild case, which ultimately resulted in this Court denying Warner Cable's petition for certiorari. *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, ___U.S. ___. 111 S.Ct. 2839 (1991).

The Petition of Cablevision asks this Court to set the boundaries of municipal immunity (under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny) from the antitrust laws at a point where such laws may be invoked to prevent a municipality, acting as a market participant, from engaging with impunity in whatever anticompetitive, predatory, and coercive activities it desires until it has succeeded in running its competitor out of business. The Petition also asks this Court to determine whether, and under what circumstances, a cable company's acceptance of a franchise from a local government can operate as an explicit or implicit waiver of fundamental Constitutional rights. In *City of Niceville*, the Eleventh Circuit held that the First Amendment afforded Warner Cable no protection against the kinds of conduct by a city-owned cable competitor that are alleged here, even when that conduct threatened to silence the only local mass media First Amendment speaker. In the decision for which the Writ is sought here, the Eighth Circuit held that the federal antitrust laws offered no protection to a cable operator threatened with the same kind of conduct from a municipally-owned competitor. Given that the antitrust laws and the First Amendment are the only possible sources of protection from this kind of conduct, the fundamental question raised by the Petition is whether cable operators have any legal protection from abusive marketplace conduct by a government-owned competitor. Warner Cable believes that,

as a matter of law, there is such protection; and that, as a matter of policy, there should be such protection. Therefore, Warner Cable supports Cablevision's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

STATEMENT

This case comes to this Court after the Court of Appeals affirmed a dismissal under Rule 12 (b)(6) Fed. R. Civ. P. by the U.S. District Court for the District of Arkansas.[1] The allegations of Cablevision's complaint, which are set forth in considerable detail in Cablevision's Petition to this Court,[2] tell a story of a competitor exploiting its unique advantages as a governmental agency to the fullest—with predictable results.[3] *See, e.g.*, Petition at pp. 4 - 5 and at p. 18, n. 9. With an existing public utility operation already in place and a direct pipeline to the public fisc, the City of Paragould and its Light and Water Commission (hereinafter referred to collectively as the "City") have both the incentive and the ability to ensure that the City-owned cable television system triumphs in the competitive struggle with Cablevision.

Cablevision's predicament in Paragould is quite similar to Warner Cable's predicament in Niceville, Florida, where it is facing competition from a municipally-owned competitor. *See generally, Warner Cable Communications Inc. v.*

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[1] The District Court opinion is reported at 739 F. Supp. 1314 (E.D. Ark. 1990). The Court of Appeals opinion is reported at 930 F.2d 1310 (8th Cir. 1991).

[2] *Paragould Cablevision, Inc. v. City of Paragould & the Paragould Light and Water Comm'n, et al.*, Petition for Certiorari in Docket No. 91-465 (filed September 16, 1991)[hereinafter referred to as "Petition"].

[3] Of course, it is well-settled that the allegations of Cablevision's complaint must be taken as true, given the procedural posture of this case. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) and *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

City of Niceville, Petition for Certiorari in Docket No. 90-1463 (filed March 15, 1991). The phenomenon of municipally-owned cable systems competing with privately-owned systems is not a rarity. Privately-owned cable operators in at least six communities now have a municipally-owned competitor, and such competition is imminent in 85 other communities in the United States. Paul Kagan Associates, *Cable TV Municipal Ownership*, March 8, 1991. The significance of this case goes far beyond the parties before this Court.

In affirming the district court's dismissal of Cablevision's complaint, the Eighth Circuit held that this Court's application of the *Parker* immunity doctrine in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and the fact that the City's entry into the cable television business was authorized by the Arkansas legislature totally immunized the City from suit under the federal antitrust laws.[4] *Paragould Cablevision v. City of Paragould*, 930 F.2d 1310, 1313 (8th Cir. 1991). In effect, the Eighth Circuit held that the Arkansas legislature had given the City a license to trample on Cablevision's rights, unfettered by the rules of the marketplace established by federal antitrust jurisprudence: "Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies." *Paragould Cablevision*, 930 F.2d at 1314.

Cablevision also complained that a franchise provision that appears to require it to obtain the City's permission

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[4] Due to the federal statutory immunity from antitrust damage suits granted municipalities by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, the only antitrust action available to Cablevision was an action for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. Thus, the question here is whether or not the City and its officials can be enjoined from anticompetitive conduct, not whether they can be forced to pay for its consequences.

to carry local advertising and to pay a tax on revenues from such advertising together with the fact that the City-owned cable system is permitted to carry such advertising without incurring such a tax is a violation of Cablevision's First Amendment rights under *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980) and under *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). *See Paragould Cablevision*, 930 F.2d at 1314, 1315. While conceding that Cablevision may have stated a valid claim with respect to both the prior restraint claim and the disparate treatment claim, the Eighth Circuit held that Cablevision had waived them all (including the disparate treatment claim, a matter clearly not addressed by the franchise provisions in question) by agreeing to the franchise: "By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights." *Id.* at 1315.

This case presents two serious issues for this Court's consideration, both of which involve important statutory and Constitutional rights and both of which have not been consistently dealt with by the lower courts—the question of whether or not "state action" immunity under *Parker* extends to a state political subdivision's actions as a marketplace *competitor*[6] and the question of whether or not, under the circumstances relating to the formation of that "agreement," a cable television operator's franchise can

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[6] The term "marketplace participant," when applied to the City in this and similar situations carries with it the capacity for misperception. To the extent that any governmental unit, including a state or its political subdivision, is a buyer of goods and services, it is a "marketplace participant." Under those circumstances, the antitrust laws afford states and their subdivisions the same protection afforded any other consumer. *See, e.g., State of Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Here, the City is not just a "marketplace participant," it is a marketplace *competitor*; and the question is whether or not its status as a government-owned competitor gives it special privileges.

be held to waive, explicitly or implicitly, fundamental Constitutional rights.

The first issue is the application of *Parker* immunity to cities acting, not as regulators, but as marketplace competitors. Although the *Parker* doctrine is based on the proposition that Congress, in enacting the antitrust laws, did not intend to preempt every state regulation that could be found to have an adverse effect on the competitive marketplace, that rationale does not apply to the situation where the state or its subdivision is acting as a marketplace competitor, rather than as a regulator. This Court appeared to recognize that distinction last term in *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___U.S. ___, 111 S. Ct. 1344, 1351 (1991). The policy reasons that support immunizing the state or its subdivisions from antitrust liability when either acts as regulator or franchise-giver do not apply to a state governmental unit that is acting as a marketplace competitor. This is the appropriate case for this Court to make that distinction clear and to establish with certainty the principle that when a state or local governmental unit decides to act as a competitor in the marketplace it must abide by the same rules that govern its privately-owned competitors.

The second issue is whether a cable operator's conclusion of a franchise agreement with a city can be a waiver of important First Amendment rights. The cable television franchising process has all the characteristics of a contract of adhesion; the governmental unit has access to a facility indispensable for the cable operator's business. A cable television franchise, from the standpoint of the cable company is a "take-it-or-leave-it" proposition. In an number of different circumstances, cable operators have sought to challenge the effect of various franchise provisions under both the Constitution and the general federal statute regulating cable television, the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (hereinafter "Cable Act"). In every instance, the franchising authority has re-

sponded, in part, by claiming that the franchise agreement is a waiver of these Constitutional or statutory rights. Both the lower federal courts and state courts have responded differently, and inconsistently, to this waiver argument. For example, in *Nashoba Communications Ltd. Partnership No. 7 v. Nashoba Cable*, 893 F.2d 435 (1st Cir. 1990), the First Circuit held that a franchise provision containing a two-year rate freeze was a "contractual obligation" that precluded the cable company from bringing a federal court challenge to the freeze as a violation of the rate deregulation provisions of the Cable Act. By contrast, the Massachusetts Supreme Judicial Court, in *Town of Norwood v. Adams-Russell Co.*, 406 Mass. 604, 549 N.E.2d 1115 (Mass. 1990) on substantially similar facts held that a cable franchise rate freeze provision was preempted by the Cable Act and therefore unenforceable.

This case, because it involves the waiver of two First Amendment claims, one arguabiy encompassed by the language of the franchise and the other clearly not so encompassed, is an appropriate vehicle for this Court to address the status of cable television franchise provisions as waivers of federal Constitutional—and perhaps statutory—rights and to clear up the confusion among the decisions of lower federal and state courts.

REASONS FOR GRANTING THE PETITION

I. WHEN TOWNS AND CITIES ACT AS MARKETPLACE COMPETITORS, THEIR ACTS AND PRACTICES SHOULD NOT BE IMMUNE FROM SCRUTINY UNDER THE ANTITRUST LAWS.

The seminal decision establishing "state action" immunity, *Parker*, 317 U.S. 341, was a very narrow one, reached "in light of our national commitment to federalism." *Omni Outdoor Advertising*, 111 S. Ct. at 1351. *Parker* adjudicated various challenges to the State of California's "Agricultural Prorate Act," a statute that, among other things,

regulated the marketing of California raisins. It was alleged that the purpose and effect of this Act was to restrict competition among raisin growers and stabilize prices. *Parker*, 317 U.S. at 346. This Court noted that it assumed that the program would violate the Sherman Act (15 U.S.C. § 1 *et seq.*), "if it [had been] organized and made effective. . . by virtue of a contract, combination or conspiracy of private persons." *Id.* at 350. This Court also observed that Congress, in the exercise of its power under the Commerce Clause, could have preempted the California raisin price stabilization program. *Id.* The question, then, was whether or not, in passing the Sherman Act, Congress intended "to nullify a state's control over its officers and agents" to carry out the program. *Id.* at 351. This Court held that there was no such intent to be found in the Sherman Act: "The Sherman Act. . . gives no hint that it was intended to restrain state action or official action directed by a state." *Id.*

Although the *Parker* Court wrote that

> a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . and we have no question of the state or its municipality becoming a *participant* in a private agreement or combination by others for restraint of trade[,]

three aspects of "state action immunity" have required further jurisprudential development. *Id.* (emphasis added, citations omitted). First, this Court has had to address the scope of immunity for private action taken pursuant to a state regulatory program. *See, e.g., California Liquor Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Second, this Court has had to address the question of transference of *state* immunity to a political subdivision, such as a city. *See, e.g., Town of Hallie*, 471 U.S. 34; *Community Communications Co. v. City of Boulder*, 455

U.S. 40 (1982). Third, this Court has rejected the implication of the above-quoted statement from *Parker* that a municipality may lose its immunity if it conspires with a private entity to violate the antitrust laws. *Omni Outdoor Advertising*, 111 S. Ct. 1344. This Court has not addressed the question of whether or not a state can authorize one of its political subdivisions to join the fray of the competitive marketplace and "do whatever it takes", including violating the antitrust laws, to emerge triumphant from that struggle.[6]

In this case, the Eighth Circuit approached the state action immunity question in a manner that would be appropriate for analysis of the permissibility of some anticompetitive state regulatory policy, not of actual anticompetitive marketplace behavior on the part of the City.[7] The Eighth Circuit held that the state's undisputed specific authorization of municipalities to enter into the cable television business included the foreseeable ("necessary and reasonable") consequence of a displacement of competition. *Paragould Cablevision*, 930 F.2d at 1314.

Accepting this conclusion requires a double leap of faith. First it requires acceptance of the proposition that the

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[6] Superficially, *Town of Hallie* would appear to address that question. However, upon examination, it does not. The City of Eau Claire was claimed to have abused its market power in the provision of "sewage treatment services" by tying these services to "sewage collection and transportation services." The sewage treatment business is hardly the paradigm of the typical competitive market for a service; it is a traditional governmental function, like police and fire protection, schooling, road construction and maintenance and water supply.

[7] The Eighth Circuit clearly recognized that Cablevision had alleged the elements of an antitrust case: "Cablevision claims that by granting cable television rights to the CLW, Paragould has facilitated 'monopoly leveraging,' which has been defined as 'the use of (1) monopoly power in one market to (2) restrain competition in a second market.' *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 506 (6th Cir. 1983)." *Paragould Cablevision*, 930 F.2d at 1313.

Arkansas legislature contemplated not only that municipal entry into the cable business necessarily would entail the competitive distortion that results because of the municipality's unavoidable advantages (the economies of scale described at 930 F.2d 1314, and, presumably, access to tax-subsidized capital), but also that the legislature contemplated that the municipality would throw its disproportionate weight around in the marketplace by such tactics as threatening pensioners with loss of retirement pay if they failed to subscribe, telling voters that they are obligated to subscribe to the municipal system and so on. *See* Petition at p. 18, n.9. It is one thing for a state or municipality to be immune from antitrust challenge because of some regulatory program that it devises and administers[8] or because, acting in the public interest, it awards a franchise to one company and denies it to all others[9]; but it is quite another matter to find a license to misbehave from a mere authorization to enter the business.

Second, acceptance of the Eighth Circuit's finding requires acceptance of the proposition that a state can "give immunity to those who violate the Sherman Act by authorizing them to violate it," contrary to the teachings of *Parker. Parker*, 317 U.S. at 351. The Eighth Circuit acknowledged this Court's statement that "this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Omni Outdoor Advertising*, 111 S. Ct. at 1351. However, the Eighth Circuit dismissed the statement

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[8] *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

[9] *City Communications v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989); *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Gold Cross Ambulance and Transfer Serv. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

as "merely a suggestion and . . . not a rule of law." *Paragould Cablevision*, 930 F.2d at 1312-13.

Neither in *Parker* nor in any of its progeny has this Court ever embraced the notion that anticompetitive conduct by municipalities competing in the marketplace is exempt from scrutiny under the antitrust laws, or that the federalism interests that animate *Parker* require the protection of such conduct from antitrust enforcement. To the contrary, in the opinion for this Court in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), Justice Brennan wrote:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced *at odds with the comprehensive national policy that Congress established.*

Louisiana Power & Light, 435 U.S. at 408 (emphasis added).

Warner Cable submits that, in this case, the issue is more than whether or not, far-fetched as the notion is, the Arkansas legislature sanctioned the egregiously anticompetitive conduct described in Cablevision's Petition.[10] Rather, the issue this case poses to this Court is whether or not the Arkansas legislature has the power to immunize such anticompetitive conduct by a municipality acting, not

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[10] In this case, the Eighth Circuit followed the holding of *Town of Hallie*, and did not consider the State's role in actively supervising the City cable company's conduct. *Town of Hallie* ultimately held that the "active state supervision" prong of the two-prong *Midcal* test for state action immunity was not required when the actor was a municipal government rather than a private party who claimed its acts were mandated by a state regulatory scheme. *Town of Hallie*, 471 U.S. 34, 47.

as a regulator or franchise-giver, but as a marketplace competitor.

II. WHEN A CABLE OPERATOR ENTERS INTO A CABLE FRANCHISE WITH THE APPROPRIATE FRANCHISING AUTHORITY, SUCH ACTION DOES NOT AUTOMATICALLY CONSTITUTE A WAIVER OF IMPORTANT CONSTITUTIONAL RIGHTS.

Rejecting Cablevision's First Amendment claims, the Eighth Circuit held, in essence, that restrictions on speech in contracts signed with government (*e.g.*, cable franchise agreements) cannot form the basis for Constitutional challenges because the signing of such contract waives all applicable First Amendment rights. This holding is the latest in a line of inconsistent decisions that attempt to address the ability of government or its instrumentalities to force a cable operator contractually to waive rights and privileges, whether Constitutional or statutory. This case is an appropriate vehicle for this Court to address this issue and resolve the conflict that exists among the lower courts.

In addition to the First Circuit and the Massachusetts Supreme Judicial Court, as reflected in the factually similar cases of *Nashoba Cable* and *Town of Norwood*, other courts have responded inconsistently to the question of whether, and under what circumstances, a cable operator may waive Constitutional or statutory rights. The Third Circuit, for example, in *Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988), held that Constitutional rights, like rights and privileges of lesser importance, may be contractually waived and thus, a consent decree settling a lawsuit between two competing cable operators and the City of Erie was construed as barring a later action by one of the cable operators against the City. Since the consent decree settled a suit that included a First Amendment claim, the Third Circuit held that a later comparable First Amendment claim had also been waived. *City of Erie*, 853 F.2d at 1096-97.

The Seventh Circuit, however, has questioned whether government should ever be allowed to condition a cable franchise agreement on the waiver of Constitutional rights. In *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 839 (1990), the Seventh Circuit, in dicta, held that "serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programer on the stipulation that the programmer waive certain Constitutional rights." *Id.* (citations omitted). Unlike the First Circuit in *Nashoba Cable*, a district court in Iowa and the Supreme Court of Vermont have both held that rights mandated by statute may not be waived or contractually relinquished. *City of Dubuque v. Group W. Cable, Inc.*, No. C-85-1046, slip op. (N.D. Iowa June 18, 1986) (LEXIS, Genfed library, Dist file); *City of Burlington v. Mountain Cable Co.*, 151 Vt. 161, 559 A.2d 153 (Vt. 1988), *cert. denied*, 492 U.S. 919 (1989). In *City of Dubuque*, the district court refused to enforce a pre-Cable Act agreement containing specific waivers of any right to deregulation, holding that such a waiver was not legally permissible under any set of facts. *City of Dubuque*, No. C-85-1046, slip op. Similarly, in *City of Burlington*, the Vermont Supreme Court held that enforcement of the paragraph of the contract regulating rates was contrary to Congressional policy and would not be a valid waiver. *City of Burlington*, 151 Vt. at ___, 559 A.2d at 155. While the Eighth Circuit in the case at bar held that "[by] entering into the franchise agreement... Cablevision effectively bargained away some of its free speech rights[,]" *Paragould Cablevision*, 930 F.2d at 1315, in *City of Burlington* the Vermont Supreme Court explicitly held otherwise. "That the regulation is contained in a contract for good and valuable consideration is immaterial. The attempt to enforce the provisions of the paragraph is an attempt to regulate, and this the [Cable] Act forbids." *City of Bur-*

lington, 151 Vt. at ___, 559 A.2d at 155 (footnote omitted).[11]

A cable television franchise can be a contract of adhesion; and under those circumstances, this Court's requirement that waivers of Constitutional rights be voluntary, knowing and intelligent will be difficult to meet. In this case, the Eighth Circuit failed adequately to address whether waiver was proper under the circumstances; and assuming *arguendo* that some sort of waiver was proper, it failed to address the nature of what was and what was not being waived by Cablevision when it executed the franchise agreement.

Section 621(b) of the Cable Act provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b). Franchises are awarded by a "franchising authority", which is defined as any governmental entity empowered by federal, state or local law to grant a franchise. 47 U.S.C. §§ 541(a) and 522(9). The City is the franchising authority in Paragould, Arkansas. Therefore, in order for Cablevision legally to provide cable television services to the residents of Paragould, it was required to obtain a franchise from the City, and only the City. In an adhesion contract, the party in need of the goods is frequently not in a position to shop and obtain

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[11] This Court has addressed the issue of waiver of rights and privileges, whether Constitutional or statutory, in various contexts other than the cable industry. *See, e.g., Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 745 (1981)(rights under Fair Labor Standards Act not waivable), *cert. denied* 471 U.S. 1054 (1985); *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 657-58 (1981) ("a State may not impose *unconstitutional* conditions on the grant of a privilege"); *Alexander v. Gardner - Denver Co.*, 415 U.S. 36, 51 (1974)("there can be no prospective waiver of any employee's rights under Title VII"), *cert. denied*, 423 U.S. 1058 (1976); *Sherbert v. Verner*, 374 U.S. 398 (1963)(requiring waiver of First Amendment rights in order to meet eligibility provisions of South Carolina unemployment compensation statute held unconstitutional).

better terms, often because the provider of the goods enjoys a monopoly, either natural or artificial.[12] As a result of Congress' decision to structure the provision of cable service in this fashion, a franchising authority (the City in this case) enjoys a monopoly position because it alone has the ability and the authority to grant the cable franchise necessary for any cable company to operate. Cable operators (Cablevision in this case) are, therefore, unable to "shop" the market for the best deal; and, instead, they are at the mercy of the franchising authority's unyielding desires.

In at least one case, these conditions led a federal district court to find that the cable franchise agreement between the City of Miami and the cable operator amounted to a contract of adhesion:

> [N]otwithstanding the sophistication of a corporation like Miami TCI, the bargaining power of the parties was far from equal under the circumstances. Consequently, even if the City has established that while Miami TCI was negotiating for the grant of the license, it agreed to waive its right to due process, the City has not satisfied the *heavy burden* of proving the validity of that waiver because it failed to show that the waiver was made voluntarily, knowingly, and intelligently, as opposed to being a necessary condition to the grant of the license.

Miami Tele-Communications, Inc. v. City of Miami, 743 F. Supp. 1573, 1578 (S.D. Fla. 1990)(citations omitted, emphasis added).

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[12] *See* Kessler, *Contracts of Adhesion*, 43 Colum. L. Rev. 628, 632 (1943); *see also Black's Law Dictionary* 38 (5th ed. 1979)(a distinctive feature of an adhesion contract is that the weaker party has no realistic choice as to its terms and the contract is offered on a "take it or leave it" basis).

It is well settled that if a Constitutional waiver is going to be held effective, it must be voluntary, knowing and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 443-85 (1981); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Miami Tele-Communications*, 743 F.Supp. at 1578. Since the Eighth Circuit affirmed the district court's dismissal of the case, for failure to state a claim for relief, no record exists from which it can be determined whether and to what extent the franchise agreement was actively negotiated, or to what extent Cablevision voluntarily relinquished its Constitutional rights. If, as the Eighth Circuit presumptively states, "Cablevision effectively bargained away some of its free speech rights," then perhaps its Constitutional waiver was proper and should be enforced.[13] *Paragould Cablevision*, 930 F.2d at 1315. However, if the City, in negotiating the advertising provision of the franchise with Cablevision, unequivocally refused to grant Cablevision the franchise in the absence of said provision, then the Eighth Circuit's conclusion rings hollow. Under this scenario, such an obdurate position by the City would certainly be grounds for finding that the franchise was a contract of adhesion.[14]

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[13] Of course this would only be true if this Court were to resolve the conflict among the various courts by affirmatively holding that a franchising authority and a cable operator may, by means of a franchise, lawfully waive certain Constitutional and statutory rights belonging to the cable operator.

[14] This Court, in concluding that a cognovit note between two companies with equal bargaining power was not a contract of adhesion, commented that where a contract is one of adhesion and where there is great disparity in bargaining power, and where the debtor receives nothing for the waiver provision, there may not be voluntary, inteliigent and knowing waiver of rights. *See Overmyer*, 405 U.S. at 187-88. Subsequently, this Court applied *Overmyer* to the agreement at issue in *Fuentes*, finding that a contract of adhesion existed because (1) there was no bargaining over contractual terms between the parties, (2) the explicit waiver provision was part of the form contract and (3) the

See Miami Tele-Communications, 743 F.Supp. at 1578. Without a full record, it is impossible to determine whether the requirements for a waiver of Constitutional rights were met in this case.

However, the Eighth Circuit's waiver theory, even if correct, does not lead to that court's ultimate conclusion—that *all* First Amendment rights were waived. Even if Cablevision effectively waived its First Amendment right to solicit and broadcast local advertising on its cable system without City approval, it does not logically follow that merely by entering into the franchise, Cablevision also waived its First Amendment rights not to be targeted for special adverse treatment as compared to similarly situated First Amendment speakers.[15]

When Cablevision entered into the franchise with the City, no other cable services were being provided in Paragould. Nearly eight years passed before the City took the appropriate steps to authorize and issue a franchise for a competing municipally-owned cable television system. Unlike Cablevision's franchise, the municipal cable system franchise does not subject advertising revenues to the franchise fee. This disparate imposition on Cablevision of an

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parties were "far from equal in bargaining power." *Fuentes*, 407 U.S. at 95.

Overmyer and *Fuentes* illustrate the importance of determining whether the agreement between two parties constitutesan adhesion contract. The present case poses a question that falls somewhere between *Overmyer* and *Fuentes*. *Overmyer* involved a clear waiver of a party's Constitutional rights, but was not characterized by this Court as an adhesion contract. *Fuentes*, on the other hand, involved an adhesion contract, but the contract itself contained no clear waiver of Constitutional rights. The present case involves a clear waiver of Cablevision's Constitutional rights (be it valid or invalid) *and* a possible contract of adhesion, a situation this Court apparently has yet to address.

[15] This Court has clearly established that the provision of cable television service is protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

additional franchise fee constitutes an improperly targeted tax, whereby one First Amendment speaker suffers differential taxation relative to a competitor. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star*, 460 U.S. 575; *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

In *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*, this Court invalidated three different forms of taxation, each of which unconstitutionally discriminated among members of the press (either newspapers or magazines). In none of these cases did the government seek to halt or interfere with the publication of any information; rather, the "First Amendment injury" resulted solely from application of a tax. The newspapers and magazines subject to discriminatory taxation were not precluded from speaking; instead, they suffered economic injury as a result of being targeted for increased tax liabilities, an act this Court found to be repugnant to First Amendment principles. *See, e.g., Arkansas Writers'*, 481 U.S. at 229-30; *Minneapolis Star*, 460 U.S. at 585; *Grosjean*, 297 U.S. at 250.

The facts here are worse than those in *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*. Not only is Cablevision subject to increased tax liabilities, which will undoubtedly result in economic injury, but also Cablevision is precluded from speaking (*e.g.*, soliciting and providing local advertisements) until it gains the City's approval. It can hardly be said, nor is there any indication in the franchise itself, that when Cablevision entered into the franchise with the City in 1983 it "bargained" for a franchise agreement that would one day be substantially different from and more burdensome than that awarded a competing franchisee. Even if the competing franchisee was a private company, instead of the City itself, the differential taxation imposed by the City upon Cablevision under its franchise

still violates the law as stated by this Court in *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*.[16]

Thus, the Eighth Circuit used a provision of what may well be an adhesion contract to find a waiver far greater in scope than what reasonably would be inferred from the language of that contract. Given that this "waiver" was of two First Amendment rights, Warner Cable urges this Court to clarify the application of franchise-based waivers of Constitutional and statutory rights.

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[16] Although this Court recently held that "differential taxation of speakers. . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas[,]" this Court did not reject the holdings of its earlier decisions that government, by imposition of economic loss through taxation, can inflict First Amendment injury. *Leathers v. Medlock*, ___ U.S. ___, 111 S. Ct. 1438 (1991). *Leathers* involved the differential taxation of different media (*e.g.*, newspapers and cable television). Like this Court's earlier decisions involving differential taxation of members of the same medium, the disparate tax treatment by the City involves two competing cable systems. Furthermore, the differential tax imposed by the City on Cablevision is both "directed at" Cablevision (since it arises uniquely out of Cablevision's franchise) and "presents the danger of suppressing particular ideas"—Cablevision's solicitation and provision of local advertising.

CONCLUSION

The Petition of Paragould Cablevision, Inc. for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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No. 91-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,
v.
CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc., hereby moves, pursuant to Rule 37.2 of the rules of this Court, for leave to file the attached brief *amicus curiae* in support of petitioner. Counsel for petitioner and counsel for respondent Paragould Power, Light & Water Commission have consented to the filing of this brief, but counsel for respondent City of Paragould has declined to do so.

The National Cable Television Association, Inc. (NCTA), a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the county's more than

50 million cable television subscribers. This case involves two issues of industry-wide importance: (1) whether a municipal cable operator's alleged attempt to displace a private competitor and thereby monopolize the local market is wholly exempt from antitrust scrutiny under the state action doctrine of *Parker v. Brown*, 317 U.S. 314 (1943); and (2) whether a city may require a cable operator to waive its First Amendment rights as a condition of receiving a franchise. These issues are of increasing concern to the NCTA because many municipalities have recently decided to operate cable systems and are misusing their governmental powers to harm private operators. In addition, because of NCTA's broad representation of cable operators, it is very familiar with the issues presented and believes that its views will be of assistance to this Court.

For these reasons, NCTA asks that its motion be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of amicus appears from the foregoing motion.

STATEMENT

This case involves antitrust and First Amendment claims growing out of efforts by a municipal cable television operator to displace a private competitor. The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.

1. Petitioner Paragould Cablevision, Inc. ("Cablevision"), began cable operations in 1983 pursuant to a franchise agreement with the City of Paragould, Arkan-

sas (the "City"). Several years later, the City decided to establish a rival cable operation. It raised the necessary capital through a $3.22 million bond issue, backed by anticipated revenues from the cable system and, if necessary, an increase in property taxes. The City then engaged in an aggressive marketing campaign, advising citizens that, unless it received at least 60% of the Paragould cable market, property taxes would probably be increased. According to petitioner, the City began operations in March 1991 and, within six months, it had acquired more than 2,000 customers. During the same period, Cablevision's subscription rate declined from over 6,300 to below 5,000.

2. Cablevision filed this lawsuit in January 1989. It alleged, first, that the City was attempting to monopolize the cable market by cross-subsidizing its cable efforts with monies earned on its monopoly in the Paragould electricity market and also by engaging in predatory pricing and other anticompetitive actions. Cablevision further alleged that the City had violated its First Amendment rights by insisting on enforcing a provision in the franchise agreement allowing the City to renegotiate a higher franchise fee before Cablevision could include advertising on its system. This provision, according to Cablevision, was doubly unconstitutional because the City had imposed no comparable requirement in its franchise agreement with its own cable operator.

The district court dismissed the claims. It first held that the City was immune from antitrust liability on the ground that the Arkansas statutes authorizing municipalities to construct and operate cable systems were sufficient to "reflect the state's policy to permit the city 'to displace competition.'" Pet. App. 21a (citation omitted). The district court also ruled that the restriction on advertising in Cablevision's franchise agreement "is contractual in nature and does not seek, nor have the effect of, regulating speech of any kind." Pet. App. 25a (foot-

note omitted). Furthermore, "[s]ince speech is not restricted by [this agreement], the absence of a similar provision in the City's agreement with [its own cable system] raises no Equal Protection or First Amendment concerns." *Ibid.*

The Eighth Circuit affirmed. As to the antitrust issue, the court recognized that this Court had recently "suggested in *dicta* that there may be a market participant exception to state immunity." Pet. App. 3a (citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991)). But the court concluded nevertheless that the market participant "exception is merely a suggestion and not a rule of law" (Pet. App. 3a-4a); therefore, the court held, it would continue to use the general standard for municipal immunity—which requires that a city be acting pursuant to a "clearly articulated and affirmatively expressed state policy." Pet. App. 3a (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985)). The court then found that this immunity standard had been satisfied here by the Arkansas statutes that "permit [the City] to enter into the cable television business." Pet. App. 4a (footnote omitted). The Court reasoned that the general availability of municipal services enables a city to "supply cable services with diminished overhead costs," and that, as a result, "the displacement of competition necessarily results whenever the state authorizes municipalities to enter an industry with monopolistic tendencies." *Id.* at 6a.

Turning next to the constitutional claims, the Eighth Circuit first disagreed with the district court, ruling that the "[City's] alleged insistence on honoring the [franchise] contract does indeed inhibit Cablevision's ability to air commercials, and thus limits free speech in the purest sense." *Id.* at 8a (citation omitted). Despite that conclusion, however, the court of appeals dismissed the First Amendment claims, explaining that "[b]y entering into the franchise agreement . . . Cablevision effectively bar-

gained away some of its free speech rights." *Ibid.* In particular, the court held, Cablevision's acquiescence in the franchise agreement defeated its claim that the City, by failing to impose a similar restriction on its own system, had unlawfully discriminated with respect to First Amendment rights.

ARGUMENT

This case presents two questions of broad importance. The first concerns the scope of antitrust immunity for municipalities when they themselves go into business. The second concerns the extent to which the government may require individuals to "bargain away" constitutional rights as a condition of receiving a public franchise. Both questions merit review by this Court.

I. THIS COURT SHOULD CLARIFY THE SCOPE OF ANTITRUST IMMUNITY FOR DIRECT MARKET PARTICIPATION BY STATE AND LOCAL GOVERNMENT.

The antitrust issue presented by this case is the one expressly left open last Term in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) —the extent to which antitrust immunity "obtain[s] where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Id.* at 1351. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.2e, at 141 (Supp. 1991) ("[w]hether such [a market] exception in fact existed and what its scope would be the Court [in *City of Columbia*] did not say"). This is an important issue on which the lower courts need further guidance, especially because the suggested distinction appears to be inconsistent with this Court's earlier decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). As the court of appeals put it in this case, "the market participant exception is merely a suggestion and is not a rule of law. Until such a transformation occurs, we will continue to use [a different] test established by this circuit." Pet. App. 3a-4a.

A. The Test for State Action Immunity Should Be More Stringent When the Government Participates in Commercial Markets Than When It Regulates Third Parties.

This Court in *City of Columbia* made clear that municipalities would be given a fairly wide berth in their ability to adopt anticompetitive regulatory policies under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In particular, the Court emphasized, a state statute need not "explicitly permit[] the displacement of competition. . . . It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes." 111 S. Ct. at 1350 (quoting *Town of Hallie*, 417 U.S. at 42). The *City of Columbia* Court also went on to apply this "foreseeability" standard rather gently, concluding that state authorization to engage in zoning provides a sufficient basis for immunizing a municipal regulation that conferred a monopoly on a private billboard company. 111 S. Ct. at 1350.

But even as it took a permissive approach to municipal regulation, the Court in *City of Columbia* specifically indicated that a different standard might be warranted when state or local government is acting as a "market participant." *Id.* at 1353; *see also id.* at 1351. In our view, the suggested distinction is well founded: the two situations raise different federalism, as well as different antitrust, concerns. This Court should thus follow up on its own suggestion. In particular, it should hold that any anticompetitive activity by a municipal market participant must be "expressly authorized" by the state before the activity is exempt from antitrust scrutiny.

1. *The Regulator-Participant Distinction.* The Sherman Act distinction between the government as market regulator and the government as market participant originated in *Parker* itself. As the *City of Columbia* Court explained, "[t]he rationale of *Parker* was that, in light of our national commitment to federalism, the general

language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States *in their governmental capacities as sovereign regulators.*" 111 S. Ct. at 1351 (emphasis added). Indeed, to emphasize this point, the Court in *Parker* had expressly noted that the "state . . . entered into no conspiracy in restraint of trade or to establish monopoly." 317 U.S. at 352; *see id.* at 351-52 ("we have no question of the state or its municipality becoming a participant in a private agreement"). *See also City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (Burger, C.J., concurring) ("for purposes of federalism," there is an important "difference between a State's entrepreneurial personality and a sovereign's decision—as in *Parker*—to replace competition with regulation") (footnote omitted).

In the antitrust context, as in other areas, the distinction between "States as market participants and States as market regulators makes good sense and sound law." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). For one thing, the two roles occupy very different places in our constitutional structure: "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). By contrast, "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader." *Ohio v. Helvering*, 292 U.S. 360, 369 (1934). This commercial role is neither a constitutionally identified, nor a traditionally sovereign, state activity. *See New York v. United States*, 326 U.S. 572, 579 (1946) ("State trading did not actively emerge until relatively recently.").

As importantly, there is substantially more reason to "presume . . . [that government] acts in the public interest" (*Town of Hallie*, 471 U.S. at 45) when it regulates *others* than when it seeks to protect its own, parochial business interests. At best, the suggestion that the "goal [of a government business] is not private profit but pub-

lic service is only partly correct." *City of Lafayette*, 435 U.S. at 403 (plurality opinion). *See also United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) (Contract Clause analysis is more rigorous when state impairs its own contract, because of concern that "a governmental entity can always find a use for extra money, especially when taxes do not have to be raised"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (same as to Takings Clause analysis). This dimension of economic self-interest is not nearly as likely to be present when the government regulates others.

For these reasons, it is a "familiar concept that 'there is a constitutional line between the State as government and the State as trader.'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696 (1976) (citation omitted). *See generally* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073 (1980). Most significantly for present purposes, this Court recently relied on this distinction in holding that the Robinson-Patman Act applies to state proprietary activities. *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983). Stressing that it was not dealing with "state purchases for *use* in traditional governmental functions" (*id.* at 153-54), the Court concluded that there was no reason to exempt "state purchases *for the purpose of competing against private enterprise*—with the advantage of discriminatory prices—in the retail market." *Id.* at 154 (emphasis added) (footnote omitted). Notably, in reaching that conclusion, the Court placed heavy reliance on its decision in *City of Lafayette*, which the *Jefferson* Court characterized as having held that the Sherman Act applies to "a city in competition with a private utility." *Id.* at 158.

On the other side of the same coin, the Court has also recognized a "market participant exception"—this time, protective of state commercial interests—under the Commerce Clause. *Reeves, Inc. v. Stake*, 447 U.S. at 437.

Relying first on the historical fact that the "Clause responds principally to state taxes and *regulatory* measures" (*ibid.* (emphasis added)), the Court further observed that "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints" (*id.* at 439 (footnote omitted)). That same concern for "evenhandedness" also supports a rigorous application of the Sherman Act when state and municipal governments choose to participate in commercial markets.[1]

2. *The Different Immunity Standards.* In our view, the appropriate place to differentiate municipal immunity standards is with respect to the degree of specificity required in the state authorizing law. In particular, while considerable flexibility is warranted when a municipality regulates others, the Court should require express state authorization for anticompetitive practices engaged in by a municipal market participant. This distinction reasonably reflects the different government interests that are implicated by the different roles. And its practicality is

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[1] The "governmental-proprietary" distinction has been criticized at times as being arbitrary and unworkable. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955). The force of such criticism, however, obviously depends on the particular circumstances of the doctrine's application. For example, it does indeed seem talismanic to decide intergovernmental tax immunity cases by pigeonholing an increasingly complex array of government functions into two discrete boxes. That is so, we submit, precisely because the purpose of the tax immunity doctrine is *not* to protect national markets and, therefore, the distinction is not well tailored to the issue it is supposed to resolve. *See, e.g., New York v. United States*, 326 U.S. at 580-83. On the other hand, when the dispositive question is whether the state is selling goods or services—as distinguished from regulating private parties—the doctrine's application is straightforward and sensible. That is so, in turn, precisely because the sole purpose of the antitrust law *is* to regulate national markets (and, correspondingly, the purpose of the Commerce Clause is to prevent undue state regulation of such markets).

demonstrated by the fact that the Court already has adopted such a state-authorization requirement for *private* market participants.

As indicated earlier, the contemporary standard for municipal immunity was explicitly fashioned in *Town of Hallie* and elaborated through application in *City of Columbia*. *See* p. 5, *supra*. To summarize, it now appears that "the key factor for state action immunity is whether a state legislature has delegated regulatory authority in a general subject area, . . . [T]he Court is [then] prepared to use its imagination liberally in determining whether particular anticompetitive conduct was a foreseeable or logical result of the regulatory delegation." Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 244 (1987). *Compare City of Columbia*, 111 S. Ct. at 1350 ("[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition"), *with id.* at 1360 (Stevens, J., dissenting) ("South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce").

This flexible approach to immunity makes good sense when a municipality is acting in a *regulatory* capacity. That conclusion follows directly from the fact that regulation, by its very nature, is likely to have anticompetitive effects. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) ("if an adverse effect on competition were, in and of itself, enough to render a state statute invalid [under the antitrust laws], the States' power to engage in economic regulation would be effectively destroyed"); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of Law & Econ. 23, 23-25 (1983) (same). This inherent quality of regulation, in turn, means that it would be virtually impossible for a

State to "catalog all of the anticipated [anticompetitive] effects" (*Town of Hallie*, 471 U.S. at 43) when it delegates broad regulatory power to a municipality. Indeed, the very purpose of the delegation is to allow the *municipality* to select what specific actions to take from a range of possibilities, each of which may have *different* anticompetitive effects. Thus, a rule requiring States to authorize specific anticompetitive results when they delegate general regulatory authority would be, in the words of the *Town of Hallie* Court, "unrealistic" (*ibid.*) and also would tend to have "detrimental side effects upon municipalities' local autonomy" (*id.* at 44).

This reasoning simply does not apply, however, when the state authorizes a municipality to enter commercial markets. That kind of authorization, much like the state's grant of a charter to a private party—and in sharp contrast to a statute authorizing zoning—says absolutely nothing about market regulation (with its concomitant anticompetitive effects). Thus, the natural presumption is—and should be—that, nothing else said, all market participants are fully subject to the Sherman Act. To rebut that presumption, the state, at a minimum, should be required to make a particularized regulatory decision, identifying which, if any, anticompetitive activities such market participants are allowed to undertake.

Unlike in the regulatory area, moreover, an express-state-authorization requirement for municipal market participants would not be "unrealistic." *Town of Hallie*, 471 U.S. at 43. In most instances, the basic question will be whether to authorize a monopoly or other specific form of market restraint (such as the price and output restrictions at issue in *Parker*). That question can readily be answered by the state when it authorizes municipal market participation. Indeed, such express state authorization is already required for antitrust immunity for private market participants. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Alum-*

inum, Inc., 445 U.S. 97, 105 (1980) ("the *challenged restraint* [here, retail price maintenance] must be 'one clearly articulated and affirmatively expressed as state policy' ") (emphasis added) (citation omitted).[2] There is no legitimate reason to tolerate a lesser authorizing requirement for public market participants.

B. The Uncertainty Created By This Court's Suggestion of a Market Participation Exception Should Be Resolved.

The court of appeals in this case candidly acknowledged its confusion over the market participant exception referred to in *City of Columbia*. Pet. App. 3a-4a. In our view, that confusion grows out of the fact that, given the heavy emphasis on *state* sovereignty in *Parker*, this Court has been struggling to find a sensible way to deal with non-sovereign municipalities under that case's rationale. Thus, the municipal immunity doctrine, from its inception thirteen years ago until last year's decision in *City of Columbia*, has gone through several phases as the quasi-sovereign nature of local governments has been accorded somewhat different significance in terms of constitutional federalism. As a by-product of this evolution, there currently exists an inconsistency between the Court's recent suggestion of a market participant exception and its earlier implicit rejection of such a view in *Town of Hallie*.

A brief review of the Court's municipal immunity cases may help to explain how this confusion arose and why it requires clarification. In its first such case, a

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[2] Although the general requirement for immunizing regulatory decisions by municipalities has been phrased in similar terms—" 'clear articulation of a state policy to authorize anticompetitive conduct' " (*City of Columbia*, 111 S. Ct. at 1350 (quoting *Town of Hallie*, 471 U.S. at 40))—the municipal standard does not require that "the challenged *restraint* . . . be . . . clearly articulated and affirmatively expressed." *Midcal*, 445 U.S. at 105 (emphasis added) (internal quotations omitted).

sharply divided Court held that state authorization to operate an electric utility did not immunize allegedly anticompetitive acts that included an attempt to monopolize. *City of Lafayette*, 435 U.S. at 392 n.6. This decision rested both on sovereignty notions and on market participation notions. Thus, the Court first emphasized that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.* at 412 (plurality opinion) (citing Eleventh Amendment cases). At the same time, the plurality also focussed on "the impact which local governments, *acting as providers of services*, may have on other individuals and business enterprises with which they interrelate as purchasers, suppliers, and sometimes, as here, as competitors." *Id.* at 403 (footnote omitted); *see also id.* at 408. Chief Justice Burger, who cast the deciding vote in *City of Lafayette*, relied exclusively on the fact that the "cities are engaging in what is clearly a business activity." *Id.* at 418 (concurring opinion). Given this configuration of opinions, *City of Lafayette* ultimately shed little light on the relative importance of a municipality's non-sovereign status versus its market participation in analyzing *Parker* claims.

Subsequent decisions have attempted to clarify *City of Lafayette's* ambiguity. First, in *Community Communication Co. v. City of Boulder*, 455 U.S. 40 (1982), the Court held, again by a five to four margin, that "home rule" authorization was insufficient to support immunity for municipal regulatory decisions. That conclusion rested squarely on the ground that "[o]urs is a 'dual system of government,' which has no place for sovereign cities." *Id.* at 53. (citation omitted). But this restrictive view of municipal "sovereignty" was softened considerably three years later in *Town of Hallie*. In that case, the Court, relying on the *dissent* in *City of Lafayette*—which had taken a strong pro-sovereignty view of municipalities (435 U.S. at 434-35)—held that a reasonably flexible approach to municipal immunity was necessary to protect

"municipalities' local autonomy and authority to govern themselves." 471 U.S. at 44. Finally, the *City of Columbia* Court reaffirmed this broad "sovereignty" view of municipalities for regulatory decisions, but then suggested, returning to *Parker* itself, that such a view might not be appropriate when government acts as a market participant.

The immediate problem with these developments for the lower courts is that *Town of Hallie* itself was a market participant case: the defendant city was in the waste removal and disposal businesses. Thus, at least in light of the facts in *Town of Hallie*, the legal issue that *City of Columbia* left open appears to have already been implicitly decided. Although, for the reasons just discussed, we think *Town of Hallie* should properly be read as having addressed the general quasi-sovereign status of municipalities for *Parker* purposes—and not the regulatory-market participation distinction raised in *City of Columbia*—that conclusion is obviously not free from doubt. This Court should provide further guidance.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER SPEECH RESTRICTIONS CONTAINED IN CONTRACTS BETWEEN GOVERNMENT AND PRIVATE PARTIES MAY BE CHALLENGED UNDER THE FIRST AMENDMENT.

The Eighth Circuit's rejection of petitioner's First Amendment claims presents a second issue worthy of review. The court of appeals held, in essence, that restrictions on speech contained in a contract with government (such as a cable franchise agreement) cannot form the basis of a constitutional challenge because the signing of such a contract waives all applicable First Amendment rights. This holding is fundamentally inconsistent with this Court's decisions involving "unconstitutional conditions" on government benefits and, if permitted to stand, will have serious practical consequences in the specific context of cable franchising.

In its complaint, petitioner raised a First Amendment challenge to the provision in its franchise agreement barring it from carrying advertising until it obtained permission to do so through renegotiation with the City and (in all likelihood) payment of an additional fee. This challenge was based in part on the fact that the competing municipal system was being allowed to carry such advertising without paying the additional fee.[3] The Eighth Circuit gave short shrift to these First Amendment claims, however, ruling that, while petitioner's speech was indeed restricted by the franchise agreement, petitioner had "effectively bargained away some of its free speech rights" —"[p]resumably" in return for some "consideration." Pet. App. 8a.

This analysis by the court of appeals is fundamentally unsound. If the acceptance of a government franchise (or any other governmental benefit, for that matter) were sufficient to defeat a constitutional challenge to the conditions that are imposed on the beneficiary, the unconstitutional conditions doctrine would be a dead letter. Every party who accepts a government benefit may be said to have "agreed" to the accompanying conditions, at least in the sense that the Eighth Circuit used that term —*i.e.*, the party was free not to take the benefit in the first place. Thus, under that court's approach, a city-imposed requirement that a cable operator air only pro-incumbent editorials would be immune from constitutional attack on the ground that the operator agreed to it as part of the overall franchise negotiation. That is not, and should not be allowed to become, the law.

On the contrary, even though the overwhelming majority of conditions on government benefits are found to be constitutional (*e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 57 n.65, 99 (1976) (*per curiam*) (public financing of campaigns

[3] The two franchise agreements each require payment of a franchise fee representing 3 percent of the cable system's gross revenues from subscribers. Only petitioner's agreement contains a conditional prohibition of advertising.

may be conditioned on agreement to campaign expenditure limits)), the process by which that conclusion is reached is necessarily more complex than the Eighth Circuit believed. Thus, in the closely analogous area of government employment, this Court has on numerous occasions made clear that voluntary acceptance of such employment does *not* bar a challenge to "unconstitutional conditions" imposed on government employees. *See, e.g., Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2736 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Moreover, when it comes to First Amendment rights, in particular, there are two well-established limitations on the government's power to condition the receipt of public benefits.

First, as a rule, the government may not require private parties to agree to espouse or not to espouse particular ideas. *See, e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (*dictum*) (government may not "discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas"'") (citations omitted); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (government may not condition tax exemption on refraining from engaging in protected political speech). The only exception to this rule is a speech limitation or requirement that directly and rationally serves the legitimate interests being pursued by government in the area at issue. *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1771-73 (1991). In the employment context, for example, the government may require a specific political affiliation in some high-level policy jobs (*see Branti v. Finkel*, 445 U.S. 507, 517-18 (1980)), and also may demand that its employees avoid speech which would interfere with job performance. *See, e.g., Connick v. Myers*, 461 U.S. 138, 150-54 (1983).

Second, even where government does not expressly regulate the content of speech through conditions imposed on its benefits, the First Amendment still demands that it avoid certain forms of discrimination among speakers in

the distribution of government largesse. Such discrimination occurs, most obviously, when the state provides favorable treatment to speakers whose viewpoint it supports. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987) (invalidating tax imposed on magazines that exempted those with specified content). But it also occurs whenever the state singles out particular members of the press and imposes disparate financial burdens on them—a practice almost inherently fraught with the danger of content-based favoritism. *See id.* at 228-29; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (invalidating tax limited to state's largest newspapers).

In this case, the provision in the franchise agreement barring advertising can be viewed as a direct restriction on content that would be facially invalid. *Cf. Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (striking down a municipal ordinance barring adult programming on cable systems). Alternatively, it might be viewed as a legitimate means of assuring the City a chance to negotiate a higher fee if and when petitioner adds a new income-producing feature to its system. But even assuming that the latter view correctly describes the facts of this case, there remains the issue of discrimination among speakers. The City has no right to impose a "surcharge" for advertising—reasonable or otherwise—where it does so only with respect to petitioner and not its competitor.

It is no answer to such discrimination to say that petitioner accepted the surcharge in the negotiation of the franchise agreement. The signing of a contract with government, on the best terms then available, hardly constitutes implicit authorization for the government to provide better terms to some other speaker. Indeed, even if a contracting party *expressly* waived all future claims of illegal discrimination under the First Amendment, such a provision would likely be unenforceable.[4]

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[4] In contrast to most constitutional rights, the First Amendment is more than an individual right; it is also aimed at preserving a

In sum, the decision below is fundamentally out of step with this Court's entire approach to the issue of conditioning government benefits on acceptance of restrictions that would otherwise violate the First Amendment. Unsurprisingly, it is also inconsistent with decisions from other circuits, which have carefully reviewed the justifications for contractual speech restrictions. Thus, two circuits have applied substantive First Amendment analysis to confidentiality agreements restricting the speech of former government employees. *See McGehee v. Casey*, 718 F.2d 1137, 1141 n.10 (D.C. Cir. 1983) ("It makes no difference to our analysis whether the government seeks to restrict the speech rights of its employees by individual contract or by a broad rule applicable to a class of employees."); *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir.) ("the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship"), *cert. denied*, 409 U.S. 1063 (1972). Moreover, as petitioner notes, the Seventh Circuit, in *dictum*, has sharply questioned the notion that "a local government with a virtual monopoly on cable access [may] condition[] a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990) (citing various unconstitutional-conditions cases).

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free flow of all ideas to willing listeners. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974). The government should not be permitted to alter that flow by inducing some speakers to waive discrimination claims as a condition of receiving a benefit. *See* Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1496 (1989) ("If government could freely use benefits to shift viewpoints in a direction favorable to the existing regime, democratic self-government would be undermined.").

The final reason supporting further review here is the potentially far-reaching consequences of the decision below on the entire cable industry. In that field, as in no other, local governments exercise enormous control over the access of would-be members of the press by requiring them to obtain franchises. If First Amendment claims are fully waivable in such instances, then success in competing for franchises may increasingly come to depend on which potential operator is most receptive to speech restrictions favored by cities. Moreover, when, as is happening with increasing frequency, multiple cable operators move into a single market, the Eighth Circuit's grant of *carte blanche* for contractual discrimination among operators will provide cities with a potent weapon for assuring that some operators succeed in suppressing their competitors. In view of these potentially mischievous consequences, the decision of the court of appeals merits immediate review and reversal.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 91-469

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF TELE-COMMUNICATIONS, INC., UNITED ARTISTS ENTERTAINMENT CO., STORER COMMUNICATIONS, INC. AND COMCAST CABLE COMMUNICATIONS, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc. (hereinafter collectively referred to as "the Cable Operators"), pursuant to Rule 37.2 of the Rules of the Court, respectfully request leave to file the attached brief as amici curiae in support of the petition of Paragould Cablevision, Inc. (hereinafter "Cablevision") for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Cablevision and respondent, The Paragould Light and Water Commission and its individual commissioners have consented to the filing of the brief amici curiae and their consents are being filed with the Clerk. Respondents, the

City of Paragould and its individual commissioners, have withheld their consent.

The Cable Operators are cable television companies operating cable television systems throughout the United States. These particular companies are among the largest multiple system operators in the nation. Over twelve million cable television customers receive their cable service from these four Cable Operators which own at least one cable system in every state in the United States. Each of the Cable Operators operate in communities in which the franchising authority either operates or is contemplating operating a municipally-owned cable system.

The law is only recently developing with respect to municipal ownership and operation of a cable television system when that municipality also franchises and regulates a privately owned competing cable system. The constitutional and Congressional constraints on that governmental conduct as decided by this Court, will affect the businesses of these Cable Operators on a daily basis. While the Cable Operators are not challenging municipal entry into the private marketplace, they contend that the First Amendment and antitrust ramifications of governmental conduct upon market participation are clearly at stake and need resolution. Absent review by this Court, Congressional directives set forth in the Cable Act and the antitrust laws will be thwarted, and will allow a First Amendment speaker to be supplanted by the government.

The attached brief amici curiae brings new and relevant information on this matter to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

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BRIEF AMICI CURIAE OF TELE-COMMUNICATIONS, INC., UNITED ARTISTS ENTERTAINMENT CO., STORER COMMUNICATIONS, INC. AND COMCAST CABLE COMMUNICATIONS, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc. (hereinafter collectively referred to as "the Cable Operators"), submit this Brief Amici Curiae in support of the petition for a writ of certiorari filed by Paragould Cablevision, Inc. (hereinafter "Cablevision").

Each of the Cable Operators operates a cable television system in one or more communities in which the municipality or other franchising authority is operating its own cable system in direct competition with the Cable Operator or in which the city is investigating the possibility of constructing and operating a municipally-owned competing cable television system. The Cable Operators operate at least one cable television system in all 50 states plus the District of Columbia and Puerto Rico, providing cable services to over 12 million subscribers pursuant to franchises granted by more than 4,000 communities.

This case raises three significant issues. First, when a municipality competes with a private cable operator and at the same time regulates its own competitor, should that municipality be required to abide by the same antitrust laws which constrain its private sector competitor? In other words, when a local governmental entity enters the private sector marketplace, should it be subject to private sector antitrust laws. Second, given the procompetitive purposes of the Cable Communications Policy Act of 1984 ("the Cable Act"), 47 U.S.C. §§ 521, *et seq.*, may a state authorize a municipally-owned cable system to displace competition in the cable television market? Finally, may a franchising authority require a cable opera-

tor to bargain away some of its constitutionally guaranteed rights as a condition of granting it a franchise, which is a federally mandated prerequsite to providing cable service? The Cable Operators assert that these questions should be answered in the negative.

If the decision reached by the United States Court of Appeals for the Eighth Circuit is upheld by this Court, other municipalities throughout the nation will be free to restrain the First Amendment rights of privately-owned cable operators as a condition of granting the required franchise, and will likewise be able to engage in anticompetitive conduct with complete immunity. That result has far-reaching effect on all cable operators providing cable service throughout the United States. In addition, the decision of the court below seriously threatens the equilibrium established by the Cable Act, as well as the antitrust laws, by permitting a municipality, acting simultaneously as a franchiser and a competing market participant, to operate its competing cable system in an anticompetitive fashion with full and complete immunity.

The Cable Operators contend that Cablevision's petition raises important constitutional and statutory questions meriting this Court's review.

ARGUMENT

I. A CITY PARTICIPATING IN A MARKET AND WHICH HAS OVERSTEPPED THE PARAMETERS ESTABLISHED BY THE ANTITRUST LAWS IS NOT ENTITLED TO STATE ACTION IMMUNITY.

The first issue presented in this case is whether a municipality participating in a market may compete with private industry and engage in conduct otherwise violative of the antitrust laws. In other words, may a municipality, which has certain regulatory authority over the cable television market, operate a competing cable television system in an anticompetitive manner and still be entitled to state action immunity? In the case at bar, the trial court dismissed with prejudice and the Eighth Cir-

cuit affirmed,[1] on the basis of facts not alleged in the complaint, an action brought by Cablevision alleging that respondents were participating in the cable television market in an anticompetitive manner.

A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This is particularly true in an antitrust suit which is often fact-laden. In such cases, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent. *See Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962); *United States v. Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 188-89 (1954). Hence, a complaint should not be dismissed unless it is found to be "wholly frivolous." *Radovich v. National Football League*, 352 U.S. 445, 453 (1957).[2]

In this case, Cablevision alleged that respondents, the City of Paragould ("the City") and the Paragould Light and Water Commission ("CLW"), are participating in the cable television market in Paragould. Complaint at ¶ 24. While a clearly defined "market participant" exception to state action immunity has yet to be articulated, this Court recently stated that when a state or municipality "acts as a commercial participant in a given market" antitrust "immunity does not necessarily obtain." *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S.Ct. 1344, 1351 (1991). In noting this possible exception, the Court relied on *Union Pacific R.R. Co. v. United States*, 313 U.S. 450 (1941). *Id.* Based upon these decisions and the facts of this case, this appeal presents the appropriate circumstances for this Court to formally and specifically adopt this doctrine.

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[1] 739 F. Supp. 1314 (E.D. Ark. 1990), *aff'd*, 930 F.2d 1310 (8th Cir. 1991).

[2] This is not to say that allegations which fail to plead the essential elements of a cognizable antitrust claim cannot be dismissed. However, in this case, the courts below recognized the viability of a "monopoly leveraging" claim, but expressly declined to reach the merits. 739 F. Supp. at 1321; 930 F.2d at 1313.

In *Union Pacific*, Kansas City, Kansas ("Kansas") sought to develop its market presence as a metropolitan rail food terminal with wholesale and retail produce markets to the disadvantage of nearby Kansas City, Missouri ("Missouri"). It also developed a plan to induce Missouri produce dealers to lease its facilities by offering cash payments and temporary reduction of rent. The district court permanently enjoined Kansas from giving cash or rental credits to Missouri dealers as an incentive for them to move to Kansas. In affirming the grant of injunctive relief, this Court found this preferential treatment violative of the Elkins Act.[3] *Id.* at 471. This Court stated that "favoritism which destroys equality between shippers, however brought about, is not tolerated." *Id.* at 462. In this Court's view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. *Id.* at 463. The Court stated it had no objection to normal business practices used to promote the city's economic welfare. However, "the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers." *Id.* at 465.

In *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion), this Court cited *Union Pacific* with approval as applicable to the antitrust laws. This Court stated that municipalities can be subjected to the same substantive standards of federal laws that impose sanctions for violations of the antitrust laws upon "persons." *Id.* at 400 & n.19. This Court, referring to *Union Pacific*, stated that "[i]t is significant that the cities' argument was rejected in the context of the antirebate provisions of the Elkins Act, a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *Id.* at 403 n.19.

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[3] The Elkins Act, 49 U.S.C. §§ 41-43, prohibits rebates, concessions and discriminations in respect to the transportation of property by railroads in interstate commerce.

The basis for the Eighth Circuit decision before this Court is the determination that entry into the cable television market by a municipality will necessarily result in certain displacement of competition. 930 F.2d at 314. The Eighth Circuit recognized the possible market participant exception, citing to *Columbia*, but dismissed it without analysis, stating that "the market participant exception is merely a suggestion and is not a rule of law." *Id.* at 1313. The Amici believe that the facts in this case merit the recognition of the market participant exception, or at the very least, the reversal of the order dismissing the complaint in order to develop a factual record. *See City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 495 (1986).

In stark contrast to *Union Pacific*, in which this Court affirmed a permanent injunction based upon an extensively developed factual record, and to *Columbia*, in which a full trial was held, the courts below dismissed Cablevision's complaint based upon facts not even alleged in the complaint. For example, the court justified its determination as follows:

> [p]resumably, rent-free office space is available, employees and 'executives' are already hired and presently serving in other capacities, trucks and equipment to service cable needs are available, demographic information has been compiled and computerized, rights of way have been secured for other purposes, and utility poles are already standing.

930 F.2d at 1314. The lower court erred by relying on these presumed "resources" in total disregard of the basic principle that motions to dismiss may only be determined upon the well pleaded factual averments contained in or made a part of the complaint. *See H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989); *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Based on these "presumed" advantages enjoyed by the City vis-a-vis Cablevision, the court found that "the challenged

anticompetitive restraint is a necessary and reasonable consequence of the City's statutorily authorized entry into the cable television business." 930 F.2d at 1314. As such, the court intuited that displacement of competition was contemplated by the Arkansas legislature when it authorized cities to enter the cable television market.

While it may be true that some anticompetitive conduct may naturally result from the entry of a municipality into the cable television market, no support for such conclusion had yet been established in this record. Moreover, there is no indication that the state meant to immunize all anticompetitive conduct by municipalities, no matter how egregious. Conduct such as tying arrangements or predatory pricing of cable services do not reasonably flow from state permission for municipalities to operate cable systems; yet under the court's decision, such conduct could occur and the private cable operator would be left with no redress.

Cablevision alleged that respondents were prepared to leverage CLW's utility monopoly and to engage in predatory conduct to ensure that it was the only competitor left in the field, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1988). Complaint at ¶¶ 27-33. Cablevision did not contend that respondents' decision to enter, or its entry, into the cable television market violated the Sherman Act. Instead, Cablevision alleged that the methods chosen and the intent of the City and CLW to destroy any competition in the cable television market within Paragould stated an antitrust claim.[4] *Id.* Under a Rule 12(b)(6) motion, all facts alleged by Cablevision in its complaint must be deemed to be true. *See Los Angeles v. Preferred*, 476 U.S. at 493.

Moreover, questions of fact remain as to the scope of the conduct immune under the state action immunity

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[4] It cannot be disputed that Cablevision's allegations of cross-subsidization state a claim under the Sherman Act. *See* Kerasotes Michigan Theaters, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989).

doctrine. Beyond its summary finding that the Arkansas State Legislature contemplated the "displacement of competition" when it enacted the subject statutes, the Eighth Circuit erred by failing to consider whether the displaced competition, which may have been contemplated, even corresponded with the specific anticompetitive conduct complained of here. Incorrectly, the Eighth Circuit was satisfied that if state action immunity applied, all claims of anticompetitive conduct would be barred. 930 F.2d at 1314. Plainly, this result perverts the state action immunity doctrine and directly conflicts with this Court's admonition in *Lafayette* that, absent specific state direction, the Court is "especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." 435 U.S. at 413.

There is no finding in the courts below, nor could there be any finding, that in authorizing municipalities to enter the cable television market, the Arkansas Legislature authorized (or under the Court's formulation—contemplated) such sharp anticompetitive conduct. In the absence of a record supporting such a finding, the respondents' claim of immunity to petitioner's specific claim of cross-subsidization should be denied. Indeed, while the subject statutes authorize the City to participate in the market, there is no reason to believe that the underlying state policy was to destroy the market and to drive its competitors out of business.

The reasoning of the decision in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), is instructive to the resolution of this case. In *Parks*, an Oregon statute authorized public ownership of geothermal resources but did not expressly authorize the exclusion of private competition. *Id.* at 663. The court recognized that even if the statute contained a state policy to displace competition, such policy did not immunize the city from all antitrust attacks:

> . . . merely demonstrating a state policy to displace competition with monopoly public service does not necessarily satisfy the additional requirement that the legislature contemplate the kind of action complained

> of. For example, merely because the state may authorize a city to be the sole supplier of a natural resource and to set the price for that resource, it does not necessarily follow that the city is immunized from antitrust liability when it attempts to tie the purchase of a non-monopolized product or service to the sale of that natural resource. As the plurality stated in *Lafayette*, 'even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.' There is nothing in Chapter 523 [the state statute] which would allow us to infer that any authorization by the state to displace competition with city-run geothermal districts also includes authorization for a city to undertake anticompetitive actions in its efforts to establish such a district.

Id. at 663-64 (citations omitted).

Unlike the court in *Parks*, the lower courts misinterpreted the intent behind the Arkansas statutes which admittedly authorized entry by the City into the cable television market but *did not* and *could not* (under the antitrust laws and the Cable Act[5]) sanction the establishment of a monopoly public service.

Just as this Court in *Union Pacific* affirmed the district court's order granting a permanent injunction because appellants' conduct did not comport with the purpose behind the Elkins Act, this Court must now reverse the Eighth Circuit's decision in *Paragould* since respondents' participation in the cable market does not comport with the antitrust laws or the Cable Act. States may authorize local governments to regulate and compete in the cable television market only to the extent permitted by federal law. This Court should, therefore, hold that cities participating in a market that overstep the parameters established by the antitrust laws are not entitled to state action immunity. At the very least, this Court should

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[5] The Amici contend that the anticompetitive conduct alleged by petitioner also results in a violation of the Cable Act's procompetitive purpose, and thus bars state action immunity, as fully discussed infra.

reverse the Eighth Circuit's opinion and reinstate Cablevision's complaint so that a record can be developed to determine if the City is properly acting as a "market participant."

II. GIVEN THE PROCOMPETITIVE PURPOSES OF THE CABLE ACT, A STATE MAY NOT AUTHORIZE A MUNICIPALLY-OWNED CABLE TELEVISION SYSTEM TO DISPLACE COMPETITION IN THE CABLE TELEVISION MARKET.

The second issue is whether, under the Cable Act, state statutes which authorize entry by municipalities into the cable television market automatically create immunity for anticompetitive conduct by those municipalities under the state action exemption to the antitrust laws. In particular, given the specific enterprise at issue, cable television, any analysis of this issue must take into account the Cable Act, as well as the federal antitrust laws. While the Cable Act permits a legislature to enact statutes which authorize the entry of municipalities into the cable television market, it does not authorize the Arkansas Legislature to enact laws which permit respondents to engage in anticompetitive conduct in order to displace competition. Such a construction would be in direct contravention of fundamental purposes underlying the Cable Act, which are to encourage growth of the cable television industry and to promote competition. In light of the procompetitive purposes of the Cable Act and its express language, the Arkansas Legislature could not have intended to displace competition with monopoly public service because the Cable Act does not authorize it to do so. That factor differentiates this case from those relied upon by the courts below. Thus, the courts below erred in finding that as a matter of law the anticompetitive conduct of the City and CLW was a "necessary and reasonable" consequence of a "clearly articulated state policy" to displace competition.

This Court said in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985), that "[t]he starting point in any analysis involving the state action doctrine is the

reasoning of *Parker v. Brown*, [317 U.S. 341 (1943)]." In *Parker*, the Court held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.* at 352. This Court further ruled that because the federal antitrust laws contained no language specifically binding the states, it would not "attribute[] to Congress" such an intent given that the application of the federal antitrust regime would substantially limit the states' legislative capacity and consequently their sovereignty. *Id.* at 351.

Municipalities, on the other hand, are not beyond the reach of the antitrust laws. This Court held in *Lafayette*, that municipalities shall not be excluded from the antitrust laws because, as opposed to states, they are not sovereign. 435 U.S. at 412. This Court further explained:

> When [local governments] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anti-competitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. (footnotes omitted).

Id. at 408. This Court has determined that to be exempt from the antitrust laws, municipalities must demonstrate that their anticompetitive activities were authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413; *Hallie*, 471 U.S. at 38. Moreover, the "state policy" that the municipality relies on for its antitrust immunity must be "clearly articulated and affirmatively expressed." *Lafayette*, 435 U.S. at 410; *Columbia*, 111 S.Ct. at 1359; *Hallie*, 471 U.S. at 44; *Community Communications Co., Inc. v. City of Boulder, Colorado*, 455 U.S. 40, 51 (1982).

Finally, this Court has held that "it is enough . . . if suppression of competition is the 'foreseeable result' of what the statute [at issue] authorizes." *Columbia*, 111 S.Ct. at 1350; *see also Hallie*, 471 U.S. at 41.

The Eighth Circuit adopted a literal application of *Hallie*, which was erroneous because it failed to take into account the Congressional constraints on state authority to regulate the cable industry, as set forth in the Cable Act. The Eighth Circuit held, in essence, that the mere fact that a state authorizes entry into the cable market necessarily implies a legislative intent to allow a municipality to displace competition by engaging in anticompetitive conduct. That construction frustrates the stated purposes of the Cable Act and the antitrust laws and would be inconsistent with the express language of and be preempted by the Cable Act.

After correctly recognizing that "Arkansas has clearly authorized municipalities to enter into the cable television business," [6] 930 F.2d at 1313-14, the court leaps to the determination that "[b]ecause of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies." *Id.* at 1314. Finally, the court held that a sufficient state policy to displace competition exists since the challenged anticompetitive restraint is a necessary and reasonable consequence of the City's statutorily authorized entry into the cable television market. *Id.* As such, the court determined that state action immunity attached as a matter of law to the acts of the City and CLW with respect to their operation of a cable television system. *Id.*

The Arkansas Legislature is authorized to enact laws regulating the cable television industry only to the extent not inconsistent with the Cable Act.[7] The regulation of

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[6] The pertinent Arkansas statutes are fully quoted in Petitioner's Brief at page 3 and at 930 F.2d at 1313 n.3.

[7] Section 556(c) of the Cable Act provides:

[Continued]

cable television is a national interest in which local authorities are permitted to participate only to the extent allowed by Congress. The purposes of the Cable Act are, *inter alia*, to "establish franchise procedures and standards which encourage the growth and development of cable systems" and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(2) and (6). While it is clear that the Cable Act established the parameters under which states and local governments can regulate cable television, it is equally apparent that two of the principle purposes behind the Act were to encourage the growth of privately owned cable companies and to encourage a competitive marketplace.

The legislative history of the Cable Act provides further support of a Congressional purpose to assist private enterprise:

> By establishing a national framework and Federal standards for cable franchising, [the Cable Act] provides the cable industry with the stability and certainty that are essential to its growth and development. In adopting this legislation, the Committee has endeavored to create an environment in which cable will flourish, providing all Americans with access to a technology that will become an increasingly important part of our national communications network.

H.R. Rep. No. 934, 98th Cong., 2d Sess. 18, 20, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4657 (hereinafter "H.R. Rep." at ——; ——.); *see also Id.* at 72; 4709 (a cable operator has an expectancy interest

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[7] [Continued]

Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

in renewal of its franchise to protect its investment); 130 Cong. Rec. S14,283 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood expressing the need to help cable achieve its full potential and compete in the marketplace). Other legislative history demonstrates competition as a key Congressional purpose. H.R. Rep. at 22-23; 4659-60 ("the public interest is served by this competition, and it should continue."). In fact, several courts have recognized that the primary purposes of the Cable Act include the encouragement of the growth of the cable industry and the promotion of competition.[8]

Given the stated purposes of the Cable Act, it cannot be asserted, as the Court of Appeals has done, that the two Arkansas statutes which authorize municipalities to construct and operate cable systems reflect a clearly articulated state policy to support anticompetitive conduct by the City and CLW in order to displace private enterprise. Such an interpretation would be inconsistent with the Cable Act and the limited congressional authority placed in state hands. In fact, the Arkansas statutes were enacted after the effective date of the Cable Act, and, thus, the Arkansas Legislature was deemed to be aware of this federal law. *See Traynor v. Turnage*, 485 U.S. 535, 546 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

In the same vein, it does not follow either from the language of the Cable Act or from the Arkansas statutes themselves that the challenged anticompetitive conduct of the City and CLW is a "necessary and reasonable consequence" of the City's statutorily authorized entry into the cable television market. While the Cable Act specifically authorizes municipalities to provide cable service,

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[8] *See* City of New York v. F.C.C., 486 U.S. 57 (1988); National Cable Television Ass'n, Inc. v. F.C.C., 914 F.2d 285 (D.C. Cir. 1990) (*en banc*); Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989); Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd., 835 F.2d 1359 (11th Cir. 1988).

47 U.S.C. § 533(e)(1),[9] this authorization must be read in conjunction with the purposes set forth in Section 521 and other provisions of the Cable Act. The Eighth Circuit's conclusion that cable service has monopolistic tendencies, not based on any evidence in the record, is inconsistent with Section 541(c) of the Cable Act, which provides that "[a]ny cable system shall *not* be subject to regulation as a . . . *utility* by reason of providing cable service." (emphasis added). *See also* H.R. Rep. at 60; 4697. Consequently, the language of the Act is directly inconsistent with the City's arguments below that the provision of cable service is a "utility," and, thus, a "monopoly public service" within the state action exemption.[10]

If it is true that the state statutes did reflect a clearly articulated policy to displace competition in the cable market or contemplated that the conduct of the City and CLW is a necessary and reasonable consequence of their entry into the cable television market, the Arkansas statutes would be open to preemption challenges under the Supremacy Clause of the United States Constitution[11]

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[9] Section 533(e)(1) of the Cable Act provides: "Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system."

[10] In fact, the legislative history to the Cable Act, the FCC and court decisions have recognized that the provision of cable service is not a monopoly. *See, e.g.*, Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 98-67, 98th Cong., 1st Sess., 29-30 (1983); In re Community Cable TV, Inc., C.S.R.-2269, p. 13, (adopted November 15, 1983); In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, FCC-90-276 (July 31, 1990) at ¶¶ 9 and 13; Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987); Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351, 355 (4th Cir. 1983); *cert. denied*, 465 U.S. 1027 (1984); Cable Alabama Corp. v. City of Huntsville, Alabama, 768 F. Supp. 1484, 1499 n.19 (N.D. Ala. 1991). Any such analysis is fact-laden and inappropriately resolved on a motion to dismiss. *See* Poller v. Columbia Broadcasting, 368 U.S. at 473; Employing Plasterers Ass'n, 347 U.S. at 188-89.

[11] Article VI, cl. 2 of the United States Constitution.

and the Cable Act. Moreover, if the *Paragould* decision is allowed to stand, the door will be open for other states and local governments to displace private cable service with the provision of cable service as a monopoly public service, in direct contravention of the Cable Act and the antitrust laws.

III. A GOVERNMENTAL REQUIREMENT THAT A CITIZEN SURRENDER ITS FIRST AMENDMENT RIGHTS AS A CONDITION OF RECEIVING A FRANCHISE FROM THE GOVERNMENT IS UNCONSTITUTIONAL.

In order to provide cable service, a cable operator must apply for and obtain a franchise from the local franchising authority. The Eighth Circuit, on its own initiative, held that a cable operator may bargain away constitutional rights by the mere acceptance of a franchise. Ignoring the fact that this "contract" is with a governmental entity and not between private citizens, the appellate court allows a local government to condition the grant of a privilege or benefit on the deprivation of a protected right. That conclusion is contrary to precedent of this Court and to the common sense recognition of the disparity in bargaining positions between a franchising authority and a cable operator.[12]

It is beyond challenge that the provision of cable television service is protected by the First Amendment. *Preferred*, 476 U.S. at 494; *Leathers v. Medlock*, —— U.S. ——, 111 S.Ct. 1438 (1991). However, these rights have

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[12] Although the petition addresses the issue as one of "waiver" of a constitutional right, this Court need not reach the factual determination inherent in the assertion of such an affirmative defense. *See* Rule 8(c), Fed. R. Civ. P. The Cable Operators contend that waiver cannot be determined on a motion to dismiss when there are no facts set forth in the complaint to affirmatively disclose that defense as a matter of law. To the contrary, no language contained in the franchise agreement indicates any intent by Cablevision to waive its constitutional rights. In fact, §§ 7.1 and 7.2 of the Franchise Agreement indicate just the opposite. In any event, any such determination requires factual development upon remand. *See* Los Angeles v. Preferred, 476 U.S. at 495.

been evolving only over the past ten or so years. Provisions contained in franchises in the 1970's are today universally recognized as unconstitutional and invalid. For example, many franchises signed by the Cable Operators in the 1970's required specific programming services to be provided on their cable systems. As case law developed, *e.g.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), and as Congress specifically codified this case law in the Cable Act, 47 U.S.C. § 544, franchising authorities recognized the unenforceability of these provisions. The Eighth Circuit's decision potentially sets back the cable industry many years in the exercise of its recognized First Amendment rights.

This Court has acknowledged that constitutional "liberties . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). However, the City's action (requiring the surrender of constitutional rights as a condition of receiving a governmental privilege) falls squarely within the type of conduct which may ultimately result in the erosion of constitutional rights. Notwithstanding the Eighth Circuit's recognition that the challenged portion of the cable television franchise "limits free speech in the purest sense," 930 F.2d at 1315, it nonetheless held that a local government may require the surrender of constitutional rights as a condition of receiving a government privilege. If this decision is permitted to stand, "guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). Such a result is inimical to constitutional law.

Cable television operators cannot lawfully use the public rights-of-way and easements or provide cable service without first being granted a franchise by a franchising authority. 47 U.S.C. §§ 541(a)(2) and (b)(1). Consequently, the relationship between a franchising authority and a cable operator is not the simple contractual rela-

tionship in which the parties have equal bargaining power, as assumed by the Eighth Circuit. Instead, unless the franchising authority grants the cable operator a franchise, the cable operator is barred *by law* from constructing and maintaining a cable system in the franchise area and is barred *by law* from exercising its First Amendment rights as a cable operator in that city.

The Eighth Circuit erred as a matter of law to assume that cable operators and franchising authorities have equal bargaining power. The unequal bargaining positions are a creature of Congressional mandate. 47 U.S.C. § 541(b)(2). That disparity exists in every franchise process, but is exacerbated when the private cable operator must bargain with a franchising authority that is also a competitor. When the competitor's conduct is unrestrained by the antitrust laws the problem is compounded. Therefore, the Court of Appeals' determination that "Cablevision could have bargained for an unqualified right to solicit and transmit advertisements," 930 F.2d at 1315, is incorrect. Based upon this erroneous conclusion of fact, the Eighth Circuit then reached the incorrect conclusion of law that a cable operator can bargain away a constitutional right. This issue was certainly not one which should have been determined on a motion to dismiss. *See Preferred*, 476 U.S. at 495.

Amici suggest that the correct approach is to recognize the case's constitutional dimension, and not to rely solely on contract law. In this fashion, one balances the government's regulatory interest and the cable operator's constitutional rights. This approach is analogous to the one used by this Court in *Frost*, in which a trucking company challenged a California statute on constitutional grounds. The statute prohibited the operation of a trucking company as a common carrier unless a permit was first granted by the appropriate governmental authority; empowered the state to regulate trucking companies; and prohibited the operation of a trucking company without a certificate from the state under "such terms and conditions as [the state] in its judgment the public convenience

and necessity may require." 271 U.S. at 590. *Frost* argued that the regulation compelled it into a position which it would not otherwise have accepted, common carrier status, in order to receive a government privilege—a certificate of public convenience and necessity.

This Court framed the issue before it as "whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so." *Id.* at 592-93. Although this Court recognized a government's legitimate authority to regulate its highways, the Court held that unconstitutional conditions could not be lawfully imposed on the grant of a government privilege:

> . . . [C]onstitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

Id. at 593. In explaining the rationale, this Court stated:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon

> such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94.[13] In fact, this Court has followed this principle[14] even when the challenge occurs after the acceptance of benefits. *Kadrmas v. Dickson Public Schools*, 487 U.S. 450 (1988).

In *Western & Southern Life Ins.*, this Court stated that it "has also held that a State may not impose *unconstitutional* conditions on the grant of a privilege". 451 U.S. at 657-58 (emphasis in original); *see also Wieman v. Updegraff*, 344 U.S. 183 (1952). Recently, the Seventh Circuit also expressed that "serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 839 (1990).

Applying these principles to this complaint, it is clear that the complaint sufficiently pled the elements of a violation of the cable television operator's First Amendment rights. It alleges that the franchise, as interpreted by

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[13] *See also* Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981); Elrod v. Burns, 427 U.S. 347 (1976); Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927).

[14] This same constitutional principle has been applied in various other areas of the law. Perry v. Sindermann, 408 U.S. 593 (1972) (denials of public employment); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare payments); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemptions).

the City, prohibits it from providing certain speech to its subscribers without first receiving the City's permission, and alleges that such a requirement violates the First Amendment. Complaint at ¶¶ 36 and 40. The Eighth Circuit's conclusion that the complaint does not state a cause of action is improperly founded on its conclusion that one may be compelled to contract away one's constitutional rights in exchange for receiving a governmental privilege. This complaint was improperly dismissed below.[15]

Permitting the Eighth Circuit's decision to stand damages the principles of constitutional law which this Court has applied since 1926. *Compare Hanover First Ins. Co. v. Harding*, 272 U.S. 494 (1926), with *Paul v. Virginia*, 8 Wall 169 (1869), and *Philadelphia Fire Ass'n v. New York*, 119 U.S. 110 (1886). Under the Eighth Circuit's decision, a governmental authority could require that *all* users of governmental facilities contractually surrender their First Amendment rights. It is inconceivable that this Court would hold that a cause of action does not exist for a First Amendment violation when a governmental entity requires the surrender of a First Amendment right as a condition for using a public auditorium or which requires surrender of a Fourteenth Amendment right as a condition for using a public right-of-way. It is equally incongruous that the Eighth Circuit should hold that a cause of action does not exist because the City required the surrender of a constitutional right as a condition for the use of its public rights-of-way.

The Court of Appeal's decision in *Paragould* is incorrect and should be reversed and remanded.

CONCLUSION

The petition for a writ of certiorari for the United States Court of Appeals for the Eighth Circuit should be granted.

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[15] This decision is not saved by the argument that the regulation is of commercial speech. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

Respectfully submitted,

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October 16, 1991

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SUPREME COURT, U.S.
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No. 91-469

In The

Supreme Court of the United States

October Term, 1991

PARAGOULD CABLEVISION, INC.,

Petitioner,

v.

CITY OF PARAGOULD AND THE PARAGOULD LIGHT AND WATER COMMISSION, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION BY RESPONDENT PARAGOULD LIGHT AND WATER COMMISSION

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PARAGOULD CABLEVISION, INC.,

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CITY OF PARAGOULD AND THE PARAGOULD LIGHT AND WATER COMMISSION, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION BY RESPONDENT PARAGOULD LIGHT AND WATER COMMISSION

The Paragould Light and Water Commission hereby files its brief in opposition to the petition for writ of certiorari filed by Paragould Cablevision, Inc. on September 16, 1991 seeking review of the judgment of the Eighth Circuit Court of Appeals in this case.

COUNTER STATEMENT OF THE CASE

Events Leading Up To The Introduction of Competition

Paragould Cablevision, Inc. ("Cablevision"), a subsidiary of Cablevision Systems Corporation,[1] has been operating a cable television system in the City of Paragould for a number of years. Cablevision currently provides cable television service to community residents pursuant to a non-exclusive franchise granted by the City of Paragould in 1983. Paragould Light and Water Commission ("CLW") is a municipally owned entity created by the City of Paragould ("City") in accordance with an act of the Arkansas legislature to provide electrical, water and sewer services in the community.

In 1984, at the instigation of the cable television industry, Congress passed the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 521 *et seq.*, which, among other things, had the practical effect of eliminating rate regulation of cable service in all but a few communities (pursuant to 47 U.S.C. § 543) and allowing the Federal Communications Commission to preempt the enforcement of meaningful technical standards by local franchise authorities (pursuant to 47 U.S.C. § 544(e)). The result in Paragould, as in most communities, was an unregulated de facto monopoly. In the wake of deregulation prices greatly increased and service deteriorated.

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[1] According to Broadcasting Yearbook, 1989 Ed., which is generally considered to be an authoritative industry source, Cablevision Systems Corporation is the 9th largest operator of multiple cable systems, operating 28 cable systems serving in excess of 1,000,000 subscribers nationwide.

In the face of increasing public dissatisfaction with the cable service provided by Cablevision and powerless to enforce substantial reform under the limits to its regulatory powers imposed by the Cable Act, the City Council decided to introduce competition in the provision of cable service. Following public hearings on the matter, in 1986 the City Council placed before the voters for approval an ordinance which would authorize the construction of a municipally owned cable television to be operated by CLW, consistent with enabling Arkansas statutes. On June 17, 1986 the voters approved the ordinance by an affirmative vote in excess of three to one. The City approved a franchise agreement effective January 16, 1989, consistent with the requirements of the Cable Act, pursuant to which CLW would provide the cable service. That franchise agreement, nearly identical to Cablevision's 1983 franchise agreement, was designed to establish a "level playing field" under which CLW would compete fairly with Cablevision.

By a special election held on October 31, 1989 the voters approved the issuance of municipal bonds to finance the construction of the cable system. On January 22, 1990 the City Council passed an ordinance authorizing the issuance of the bonds.

Cablevision Initiates Litigation

On January 29, 1990, even before CLW had strung the first foot of cable, Cablevision initiated the instant lawsuit.[2] In its complaint Cablevision alleged in Count I that

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[2] On January 18, 1990, Cablevision also filed a suit in state court alleging that the construction and operation of the cable

(Continued on following page)

the defendants announced plans to enter the cable television market constituted a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, under a monopoly leveraging theory. In Count II Cablevision alleged that a provision of its franchise agreement which restricts its carriage of local advertising constitutes a violation of the First and 14th Amendments. In Count III it was alleged that by granting a franchise to CLW the City breached its contract obligations with Cablevision under a theory of good faith and fair dealing.

Acting on the motions of the City and CLW, the U.S. District Court dismissed all three counts of the lawsuit.[3] Count I was dismissed as to the individual defendants on the ground of legislative immunity and as to the City and CLW on the basis of state action immunity.[4] Count II was

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(Continued from previous page)

system by CLW was illegal under Arkansas law. The complaint sought a permanent injunction against the construction and operation of a cable system by either the City or CLW. Following summary judgement by the Greene County Chancery Court in favor of the City and CLW, Cablevision sought review before the Arkansas Supreme Court. On May 17, 1991 that court affirmed the decision of the Chancery Court, finding that the City had lawfully delegated authority to CLW to construct and operate the cable system. *Paragould Cablevision, Inc. v. City of Paragould et al.*, 305 Ark. App. 476 (1991).

[3] The text of Judge Thomas Eisele's order dismissing the lawsuit is reprinted in the appendix of Cablevision's petition at pages 10a-27a.

[4] The District Court did not reach the alternative arguments submitted by the defendants to the effect that the antitrust laws are not available to sustain a monopoly and that the action was premature in that the plaintiff had not suffered actionable injury.

dismissed on the ground that the contractual provision complained of does not violate the protection of either the First or 14th Amendments. Count III was dismissed because it involved a pendant contract claim under state law.

On appeal, the Eighth Circuit affirmed the District Court dismissal of Cablevision's complaint. It found that the Arkansas statutes provide state action immunity from any anticompetitive implications in the City's and CLW's conduct in entering into the cable television business. Relative to the constitutional claim, the Eighth Circuit held that by entering into a franchise agreement which excluded its carriage of local advertising, Cablevision had bargained away any free speech rights it may have had with respect to such advertising.[5]

Cablevision's Mischaracterization Of The Decisions Below And The Introduction Of Facts Not At Issue

In its petition before this Court Cablevision attempts to interpret the Eighth Circuit opinion in broader terms with more sweeping impact than warranted in context with either the law expressed in the opinion or the facts at issue. It characterizes the case as involving "the question of whether the municipally-owned cable system may engage, as it is currently doing, in whatever anticompetitive, predatory and coercive activities it desires, without the constraint of the antitrust laws, until it has succeeded in running its competitor out of business." (Petition at

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[5] See text of decision reprinted in the appendix to the Petition at 1a-9a.

3-4.) In no way could the opinions of either the District Court or the Eighth Circuit be read to support such hyperbole.

Further, in its Statement Cablevision shows no regard for the facts alleged in its complaint, which was filed before CLW commenced construction of its cable system and pertained to allegations such as the City's power to regulate, CLW's control over the poles as used by Cablevision, CLW's monopoly in the sale of electric power, and the "belief" that CLW would string its cable in violation of the National Electric Safety Code. Cablevision's petition before this Court says little about these alleged facts. Rather, it has now introduced new "facts" to support the "egregious" conduct it claims to be facing, such as "the City has flexed its taxing authority muscle in its efforts to persuade voters to support a municipally-owned system," CLW is leveraging "itself into a monopoly position through cross-subsidization, predatory pricing, and other anticompetitive acts," and "the City is rapidly advancing towards its goal of market dominance and monopolization."[6]

There are no such factual allegations in Cablevision's complaint (see text reprinted in the attached appendix). It is elementary that any court addressing a motion to dismiss must accede the truth of factual allegations for purposes of the motion. And that is what both the District

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[6] Petition at 4-5. It is interesting to note that Cablevision bases this claim of "market dominance" on the fact that after six months (when the CLW system was essentially fully constructed) CLW had 2,000 subscribers to Cablevision's 5,000.

Court and the Eighth Circuit did in addressing the issues here.

Cablevision's Objective Is The Elimination Of Competition

Notwithstanding Cablevision's pious statement made repetitively in its Petition that it does not oppose CLW's entry into the cable business, there is no doubt that its objective in initiating litigation is the elimination of competition. Its complaints in both federal and state court specifically and clearly seek a permanent injunction against the operation of the municipal cable system and were filed before the first foot of cable were strung. With incredible chutzpa and brazenness Cablevision attempts to turn the Sherman Act on its head and use it as a shield to protect its previous monopoly position. Similarly, it attempts to use the First Amendment as a club to drown the "voice" of CLW, the second cable system "speaker" in the community.

There is little doubt that Cablevision and its allies in the cable television industry are determined to challenge almost every municipality that has had the temerity to launch a publicly owned cable system in competition with a privately owned former monopolist.[7] No doubt that is the motivation of the powers of the industry, the

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[7] Incumbent cable operators have initiated legal challenges to the entry of municipally owned competitors in following cities, in addition to Paragould: Niceville, Florida; Glasgow, Kentucky; Osage City, Kansas; Negaunee, Michigan; Elbow Lake, Minnesota; and Philippi, West Virginia.

National Cable Television Association, Tele-Communications, Inc., United Artists Entertainment Co., Storer Cable Communications, Inc., and Comcast Cable Communications that seek approval to file amicus briefs in support of the Cablevision position. There is no reason for this Court to give further legal opportunities to these forces in their cynical attempts to smother in its infancy this real, if embryonic, threat of competition.

SUMMARY OF REASONS FOR DENIAL OF THE PETITION

First and foremost, this Court must recognize that the issues posited by this case according to Cablevision are far beyond what is needed to address the controversy raised by Cablevision's complaint. As will be demonstrated in the argument presented below in connection with each of these so called "issues", either the questions were not raised below or their resolution is not necessary in resolving the issues raised by the complaint. In other words, the Petitioner is attempting to raise issues, which in the abstract may be interesting, that need not be addressed in connection with this case. In misportraying the issues that are necessary to the resolution of this case, Cablevision is violating the charge of accuracy, clearness and relevance demanded by Rule 14.5 of this Court.

In general, Cablevision has attempted to massage the facts and characterize the decisions below so as to imply that they raise issues of major importance with sweeping

precedential implications. Careful analysis brings to light this attempted transmogrification.

According to Cablevision the result of these "errors" will be "to permit any municipality to run out a private cable speaker by whatever anticompetitive means it chooses" and "any municipality can extract a 'waiver' of First Amendment rights in the franchising process, a task made easier by the threat of predatory municipal competition." (Petition at 9.) The end result, according to Cablevision, "will be communities with no local speaker, but only a government-owned electronic press . . . a particularly chilling result in the thousands of communities like Paragould with no truly local over-the-air broadcast station." (*Id.*)

Reading such hyperbole detailing the dire consequences of the decision below one could almost envision a radical diminution of the antitrust laws and the First Amendment with local governments left and right ruthlessly driving out of business media companies valiantly flying the flag of the First Amendment to the end. If a "Chicken Little" prize were awarded for the "sky-is-falling" rhetoric in pleadings, Cablevision would surely be a winner.

In reality what this case stands for – nothing more or less – is the attempt of a major cable television conglomerate to use the antitrust laws and the First Amendment in a blatant attempt to exclude competition by a small publicly owned competitor. The lawsuit was dismissed below because it simply states no judiciable claims under law. No sweeping new precedents were set by the Eighth Circuit opinion. From a practical standpoint, the only end

result of a refusal by this Court to review the decision below will be that a few more communities may be emboldened to introduce a competitive alternative to the *de facto* cable television monopoly.

In summary, Cablevision has violated the rules of the Court in setting forth the questions for review. It has inaccurately set forth the facts at issue and mischaracterized the opinion below. Further, analysis of the issues raised by Cablevision and addressed below reveals no error of law and demonstrates no major national interest that would warrant this Court's review. Accordingly, the petition should be denied.

ARGUMENT

I. The Questions Presented By Cablevision Far Exceed The Legitimate Issues Posed By The Complaint And The Decision Below And Thus Violates The Court's Procedural Rules

Cablevision advances three arguments in support of its petition. First, it claims that a municipally owned commercial participant should be fully subject to the antitrust laws regardless of the state action immunity doctrine. Second, it argues that the Arkansas legislature did not authorize behavior in violation of the Sherman Act. And finally it contends that the Eighth Circuit failed to apply relevant precedent in analyzing its First Amendment claims.

Rule 14.5 of this Court states that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness

whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Cablevision has undoubtedly violated this rule in more than one fundamental manner.

First, Cablevision's petition repeatedly states that it does not oppose the entry of CLW into the cable business when in fact (1) its complaint was filed before CLW even commenced construction of its cable system and thus necessarily involved *only* the question of entry and the allegations in the complaint relating to entry, and (2) its complaint seeks a *permanent injunction* against the construction and operation of CLW's cable system. (See the appendix hereto at 13a.) This obviously violates the requirement of "accuracy" relevant to the legitimate issues of the case.

Second, in its obvious attempt to attract the interest of the Court, Cablevision has mischaracterized the issues. Most significantly, it has posited as a question: "Whether the conduct of a municipally-owned cable television system, as a market participant, is entirely immune from antitrust scrutiny." Cablevision attempts to support this broad question, as pointed out above, by the introduction of new alleged facts that go far beyond the allegations of the complaint and seriously misrepresents the immunity question as related to the facts alleged in the complaint. Consequently, Cablevision has violated the charge to petitioners under Rule 14.5 to *accurately* and *clearly* present the *essential* points requiring consideration by the Court.

The details relative to these points are discussed in more depth in connection with the argument below addressing the various Cablevision claims.

II. The Eighth Circuit Properly Decided The Antitrust Immunity Issue Consistent With The Facts Before It.

a. The Legal Standard For Immunity

There appears to little substantive dispute as to the general standard for a finding of state action immunity under the doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943). Under this doctrine a state's action is immune from claims under the federal antitrust laws. Without attempting to detail the development of the doctrine over the years and how it applies to various activities that may have the color of state action, it suffices for purposes here simply to outline the precedent relevant to municipal immunity. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978), the Supreme Court held that municipalities do not on their own have the immunity accorded a state but have immunity only when they are operating pursuant to a clearly articulated policy contemplated by the legislature. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court developed a second test, i.e., active state supervision of the activity complained. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court held that this active supervision test does not apply to municipal entities. More relevant here, it expanded on the *City of Lafayette* test for the clearly articulated state policy, holding that "the municipality need not 'be able to point to a

specific detailed legislative authorization' in order to assert a successful *Parker* defense," quoting in part from *Lafayette*, and going on to conclude that it is enough if the alleged anticompetitive conduct "is a foreseeable result" of the statutory scheme. *Id.* at 39, 42.

Cablevision makes two claims of error relative to the state action immunity issue. First, it contends that a municipally owned commercial participant "should be" subject to the antitrust laws. Its second argument is that the courts below did not properly interpret the legislative intent of the Arkansas legislature relative to antitrust immunity.

b. Immunity For The Municipal Competitor

Cablevision argues that "a municipally-owned market participant should be subject to the same rules of competitive behavior as all of its competitors." (Petition at 10.) In support of this proposition it argues that the Eighth Circuit misapplied *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991). It should be noted that *City of Columbia* is such a recent case that it was handed down after this case was briefed and argued before the Eighth Circuit. The Petitioner subsequently supplied a copy of the case to that court shortly before its decision was issued.

The Eighth Circuit did take notice of *City of Columbia* in its decision, stating that it "suggested in dicta that there may be a market participation exception to state immunity."[8] However, it went on to characterize the "market exception" as merely a suggestion and not a rule of law.

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[8] Text reprinted in Petitioner's brief at 3a.

Based on *City of Columbia* Cablevision now argues that municipally owned competitors should be exempt from the state action immunity doctrine which has built up over the years. There are several reasons why the Court should reject such a suggestion.

First of all, as the Eighth Circuit noted, that comment was clearly offered in dicta in *City of Columbia*. Such a sweeping policy change should be made only after careful consideration by this Court, if not by Congress, on the basis of a full record in a case where the issues require its resolution.

Second, and more importantly, it is not necessary to address that question in order to rule on the legitimate issues in this case. As pointed out above, Cablevision's complaint was filed well before CLW commenced its cable service. Hence, the essential issue here is, and has been, whether any anticompetitive results of CLW's entry into the cable business, which is what Cablevision's complaint focused on, was contemplated by the Arkansas legislature. The broader question posed by Cablevision is whether there should be any limits to the immunity of a municipal competitor. Apart from the rhetoric of Cablevision which alleges facts that are not part of its complaint or the record below, that question is simply not at issue here. As discussed below, the only immunity issue goes simply to market entry by CLW and those acts, as alleged by Cablevision in its complaint, which are associated with entry.

c. The Intent Of The Arkansas Legislature

The basis for the City's and CLW's immunity are three Arkansas statute provisions: A.C.A. Sec.

14-199-601(a) (which allows a city to acquire, construct and operate a cable system[9]), A.C.A. Sec. 14-199-602 (which pertains to a city's erection and maintenance of wires and other cable system fixtures[10]), and A.C.A. Sec. 14-164-303, 309 (which provides for the issuance of municipal bonds for municipal improvements, including "facilities for the generation, transmission, and distribution of television communications"). The District Court characterized this grant of powers as "broad," "sweeping" and "comprehensive," finding that "these statutes authorize the entry of the city into the market and reflect the state's policy to permit the city to 'displace competition' since 'the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.' "[11]

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[9] This statute states: "Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting, and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town."

[10] This section states: "The city or town may erect, construct, operate, repair, and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy wires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal distribution system."

[11] District Court Order reprinted at 5a of Petitioner's brief, quoting from *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 522 (8th Cir. 1985).

The Eighth Circuit concurred in this analysis. It concluded that Arkansas had clearly authorized municipalities to enter the cable business and that given the fact that municipalities generally enjoy access to government infrastructure such as utility poles and rights-of-way, an entity such as CLW benefits from this access and other advantages. It concluded that "[b]ecause of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies."[12]

In challenging this finding, Cablevision argues that the "intent of the City and CLW to destroy competition in the cable television . . . is not a necessary and reasonable consequence of the defendants engaging in the cable television business, the 'authorized activity' by the State of Arkansas." (Petition at 14.) It further argues that the Arkansas legislature did not intend the silencing of "First Amendment speakers" through anticompetitive means.

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[12] Text reprinted in Petitioner's brief at 6a. Note that these factors are more likely to be characterized as inherent advantages rather than consisting of anticompetitive conduct. Similarly, Cablevision has certain inherent competitive advantages that CLW does not enjoy due to Cablevision's position as a subsidiary of a major multiple system operator (see note 1). This status yields many advantages for Cablevision, e.g., easy access to capital, highly experienced management, and great bargaining power in the purchase of cable, equipment and programming. However, given the fact that Cablevision alleged that CLW's position constituted potential anticompetitive conduct, the courts below were correct in assuming the truth of the factual allegations for purpose of addressing a motion to dismiss the complaint.

Cablevision states that it "does not contend that the decision of the City and CLW to enter the cable television business violates the antitrust laws." (*Id.*)

Notwithstanding this denial, it is clear that Cablevision's goal is to eliminate CLW as a competitor. Indeed, in terms of relief Cablevision's complaint asks that the City and CLW be permanently enjoined from constructing and operating a cable television system. (See the appendix hereto at 13a.) In an attempt to rewrite facts that go far beyond any allegations in its complaint, Cablevision's petition claims that CLW is engaged in "cross-subsidization" of its cable service, "below cost pricing," and having exerted unfair pressures on municipal employees. (Petition at notes 6 and 7.) None of these allegations are mentioned in its complaint. Indeed, they could not have been since the complaint was filed long before CLW actually commenced cable service.

The facility with which Cablevision toys with the facts and shamelessly changes its position without regard for the bases cited in its complaint is little short of outrageous, not to speak of its brazen attempt to use the antitrust laws to shield itself from competition.

Indeed, as both of the courts below concluded, even a cursory reading of the Arkansas statutes reveals a clear legislative intent to allow municipalities to enter the cable television business. To the extent such entry results in competitive harm of the type alleged in the complaint to an existing cable operator, the legislature obviously contemplated it as a necessary and reasonable consequence, as the Eighth Circuit concluded. Cablevision's hyperbole

notwithstanding, the only issue raised by its complaint is entry and entry alone.

Hence, there is no rational basis for the claim that the "reasonably foreseeable consequence" test for immunity as set forth in *City of Lafayette* has not been satisfied.

III. No Legitimate First Amendment Claim Has Been Raised

Cablevision's complaint alleged that a provision of its franchise agreement violated the First and Fourteenth Amendments. The objected to provision (in Section 2.4) states in relevant part:

> This agreement does not cover . . . additional income-producing activities of [Cablevision] such as advertising over [Cablevision's] cable TV system. If [Cablevision] should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation.

Below, Cablevision argued that this provision impinges upon its commercial free speech rights and is discriminatory since the CLW franchise agreement contains no such restriction. Further, Cablevision argued that the City will permit such advertising only if the resulting revenue is subjected to the franchise fee paid to the City.

The District Court found that this provision does not constitute the regulation of commercial speech, but offers

"the parties a mechanism by which they may, at their election, submit proposals for the modification of existing contractual terms should unusual circumstances so require."[13]

The court of appeals affirmed the dismissal of these constitutional claims but on a somewhat modified ground. It held that while this provision does "inhibit Cablevision's ability to air commercials, and thus limits speech in the purest sense . . . By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights."[14] As to the discriminatory media tax claim, the Eighth Circuit agreed with the District Court that it was premature.[15]

According to Cablevision, the thrust of this decision is that "a local government, in exchange for a franchise, is free to extract the entirety of the First Amendment rights recognized by the Supreme Court." (Petition at 21.) Again Cablevision's rhetoric outruns the alleged facts. Nowhere in its complaint does Cablevision allege that it was forced into such a concession in order to gain the franchise or was otherwise subjected to undue pressure by the City. Indeed, any reasonable reading of the provision would indicate simply that it was a matter not covered by

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[13] Opinion as reprinted in Petitioner's brief at 24a.

[14] Decision reprinted at 8a in the Petition.

[15] The Eighth Circuit opinion is in error when it states that CLW's advertising revenues are not "burdened" by application of a franchise fee. While CLW's franchise does not proscribe it from carrying local advertising, all of its revenues are subject to the franchise fee – the precise arrangement that the City has offered Cablevision.

the agreement and subject to future negotiation if Cablevision decided it wanted to engage in such activities. In fact, Cablevision's complaint acknowledges that the City has indicated it would amend the agreement to allow Cablevision to carry provided that the advertising revenues were subject to the franchise fees.[16]

Apart from its rhetorical flourishes, Cablevision challenges this Eighth Circuit finding on the ground that it constitutes a constitutional waiver, to which the court did not apply the proper test, i.e. that it must be "voluntary, knowing and intelligent," citing *Edwards v. Arizona*, 451 U.S. 477, 483-85 (1981); *Faretta v. California*, 422 U.S. 806, 835 (1981); and *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); and *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and that such waivers be established by clear and compelling evidence, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967).

Initially, one must challenge Cablevision's argument that the court of appeals' finding amounted to a constitutional waiver. Although one could conclude in the abstract, as did the court of appeals, that the contractual provision at issue may "impinge" upon Cablevision's unfettered right to carry local advertisements, such limitation hardly constitutes a waiver of a constitutional right. As Cablevision itself acknowledges, all it had to do to achieve a modification of its franchise agreement so as

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[16] See complaint at paragraph 37, page 10a of the appendix hereto.

to provide for such carriage was to agree that the revenues so derived would be subject to the franchise fee. Hence, if there is a real constitutional issue, it is whether the imposition of a franchise fee on a cable operator's commercial speech is violative of the First Amendment. However, that issue is not raised in the complaint.

But even if the Eighth Circuit opinion could be interpreted to constitute a determination that this contractual provision amounted to a constitutional waiver, any objections by Cablevision at this date are not timely. It is well established that "constitutional objections may be waived by a failure to raise them at a proper time." *Curtis Publishing Co. v. Butts*, 388 U.S. at 143, citing *Michel v. Louisiana*, 350 U.S. 91, 99 (1955). If at the time that Cablevision entered into this contract it felt that the provision in question unduly "impinged" on its constitutional right, it had an obligation to raise an objection at that time. It did not do so. To the extent that this contractual provision constituted a surrendered constitutional right, it was clearly a bargain that was acceptable to Cablevision at the time. As the Eighth Circuit concluded:

> Cablevision could have bargained for an unqualified right to solicit and transmit advertisements. No law mandated otherwise. Cablevision simply failed to protect its commercial rights. Presumably Cablevision received consideration in return for this sacrifice, but apparently what was once considered a satisfactory bargain has turned into a sour deal. Regardless, Cablevision cannot now invoke the first amendment to recapture surrendered rights.[17]

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[17] Opinion reprinted in Petition at 8a.

Cablevision cannot now reasonably raise the First Amendment issue or claim that the Eighth Circuit did not apply the formal test for waiver. Obviously, Cablevision knowingly waived its unfettered rights to carry the advertising in question at the time it executed the agreement. It cannot now be heard to claim at this late date that any such constitutional waiver was not done voluntarily and knowingly, particularly when its complaint never made any allegations that suggested otherwise or alleged that it was coerced.[18]

Finally, as this Court has recognized, the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 563 (1980). Except for *D.H. Overmyer Co. v. Frick Co.* and *Curtis Publishing Co. v. Butts* all the cases cited by Cablevision in support of a relatively rigorous standard for applying the test for constitutional waiver involve criminal cases where personal liberty is at stake and this Court has traditionally applied a more exacting standard. Similarly, the Court has applied an exacting standard relative to libel suits against the press, which was the focus of *Curtis Publishing Co.* In *D.H. Overmyer Co.* the

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[18] Cablevision attempts to suggest the possibility of coercion, without alleging that it was actually subjected to coercion by the City, by referring to hypothetical possibilities and quoting language from *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), involving circumstances in which a local government regulatory body "stipulated" that the cable operator waive certain constitutional rights. (See Petition at 23.) There are no factual parallels here, alleged or otherwise.

Court suggested a less rigorous standard in a corporate-property right context where there is no evidence of "unequal bargaining power or overreaching." 405 U.S. at 185-86. Given the confluence of the lesser protection afforded commercial speech with the less rigorous application of the constitutional waiver standards, there is no reason to believe that the constitutional analysis of the Eighth Circuit would not suffice under circumstances here.

Accordingly, there is no doubt that the court of appeals properly decided the constitutional issue.

CONCLUSION

As demonstrated above, there is no reason why this Court should grant Cablevision's petition. Cablevision has greatly overstated the legal issues that are relevant to the case. In view of the issues here, both factual and legal, there is no need for the Court to address the issues posited by Cablevision. Further, the courts below have resolved the questions at legitimate issue consistent with applicable law and precedent. Accordingly, the petition for certiorari should be denied.

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October 17, 1991

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
AT JONESBORO

PARAGOULD CABLEVISION, INC. Plaintiff, v. CITY OF PARAGOULD, ARKANSAS, PARAGOULD LIGHT AND WATER COMMISSION, CHARLES PARTLOW, DON PERKEY, DOUGLAS J. SMITH, TIM WOOLDRIDGE, BEN BRANCH, PHYLLIS DEES, JAY W. DORTCH, FRANK GATLIN, JAMES INNESS, GEORGE COOK, JEPTHA FUTRELL, JERRY JETTON, WILLIAM BREWER, MACK SHOTTS Defendants.	)	Civil Action No. J-C-90-14 (Filed Jan. 29, 1990)

COMPLAINT

Plaintiff Paragould Cablevision, Inc. brings this action seeking injunctive and other relief for violations of the federal antitrust laws and the United States Constitution and for breach of contract against Defendants City of Paragould, the Paragould Light and Water Commission, and the individual members of the Paragould City Council and the Paragould Light and Water Commission.

JURISDICTION AND VENUE

1. This action arises out of violations of the Sherman Act, 15 U.S.C. § 2, and the First and Fourteenth Amendments to the United States Constitution and out of a breach of contract by Defendants.

2. This court has jurisdiction over these claims and the Defendants under Section 16 of the Clayton Act of 1914, 15 U.S.C. § 26, Section 1983 of Title 427 of the United States Code, 42 U.S.C. § 1983, and Section 1331 of Title 28 of the United States Code, 28 U.S.C. § 1331, and under principles of pendent [sic] jurisdiction. Venue is proper in this district under Section 1391(b) of Title 28 of the United States Code, 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiff Paragould Cablevision, Inc. ("Paragould Cablevision") is a Massachusetts corporation with its headquarters and principal place of business in Greene County, Arkansas. Paragould Cablevision operates a cable television system in Paragould, Arkansas pursuant to a franchise granted to it by the City of Paragould.

4. Defendant City of Paragould, Arkansas ("City") is a municipal corporation organized and existing under the laws of the State of Arkansas and located in Greene County, Arkansas.

5. Defendant Paragould Light and Water Commission ("CLW") is an entity created by the City of Paragould pursuant to Act 562 of 1953. By Ordinance Nos. 625

and 84-7, the City of Paragould has charged CLW with the responsibility of operating, controlling, and supervising its municipally-owned light, water and sewer plants.

6. Defendant Charles Partlow is sued solely in his official capacity. He is and at all times relevant was the Mayor of the City of Paragould, Arkansas.

7. Defendant Don Perkey is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of Paragould, Arkansas.

8. Defendant Douglas J. Smith is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of Paragould, Arkansas.

9. Defendant Tim Wooldridge is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

10. Defendant Ben Branch is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of Paragould, Arkansas.

11. Defendant Phyllis Dees is sued solely in her official capacity. She is and at all times relevant was a member of the City Council of Paragould, Arkansas.

12. Defendant Jay W. Dortch is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

13. Defendant Frank Gatlin is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

14. Defendant James Inness is sued solely in his official capacity. He is and at all times relevant was a member of the City Council of the City of Paragould.

15. Defendant George Cook is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

16. Defendant Jeptha Futrell is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

17. Defendant Jerry Jetton is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

18. Defendant William Brewer is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

19. Defendant Mack Shotts is sued solely in his official capacity. He is and at all times relevant was a member of the Paragould Light and Water Commission.

FACTUAL ALLEGATIONS

20. At all relevant times, Plaintiff Paragould Cablevision has owned and operated a cable system in the City of Paragould. Paragould Cablevision operates its

system pursuant to a November 28, 1983 franchise granted by the City of Paragould, Resolution No. 83-22. A copy of the franchise agreement is attached hereto as Exhibit 1 and is made a part hereof.

21. The cable system owned and operated by Paragould Cablevision consists of a central receiving antenna known as a "headend," and a network of coaxial cable. The coaxial cable is installed in public rights-of-way, generally as an additional wire on utility poles or buried underground in public utility easements. The cable system receives programming at the headend from either broadcast, microwave, satellite, or studio facility transmissions. The programming is then retransmitted by Paragould Cablevision from the headend to subscriber homes. In order to receive cable television, subscribers must have access to a television set that is connected to the cable system's headend through the coaxial cable network.

22. Paragould Cablevision has expanded considerable sums of money in the construction and maintenance of its cable system over two decades and currently has over 6,000 subscribers. From 1986 to 1989 alone, Paragould Cablevision spent in excess of $ 1.2 million to upgrade cable service to the City of Paragould.

23. On June 17, 1986, the City of Paragould adopted Ordinance 86-3, authorizing CLW to construct and operate a duplicative, municipally-owned cable television system. The Ordinance authorized CLW to pursue its plan to construct and operate a cable system that would provide

a forty channel basic service at a cost of $9.95 per subscriber.

24. On June 6, 1988, the City adopted Resolution 88-10 directing CLW to undertake the necessary steps for construction and operation of a cable television system. Subsequently, on January 16, 1989, pursuant to Resolution No. 89-1, the City of Paragould approved a cable television franchise agreement between the City of Paragould and CLW authorizing CLW to construct and operate a cable television system within the City of Paragould in competition with Paragould Cablevision. A copy of the franchise agreement between the City and CLW is attached hereto as Exhibit 2 and is made a part hereof.

25. The construction of the cable television system by CLW is contingent upon the City of Paragould obtaining funds through the issuance of bonds. At an election held on October 31, 1989, a majority of the voters in the City of Paragould authorized the issuance of such bonds in an amount not to exceed $3.22 million for the purpose of financing the cost of acquiring, constructing and equipping a cable television system. The bonds are to be secured by a pledge of the revenues derived from operation of the cable television system and by a suspended tax at the rate of 6.5 mills on the dollar, on the assessed value of the taxable real and personal property in the City of Paragould. On information and belief, the issuance of these bonds could therefore result in the imposition of a real and person property tax rate that is up to three times greater that the rate currently imposed on the citizens of Paragould. The issuance of these bonds is believed to be imminent.

COUNT I
(Attempt to Monopolize)

26. Plaintiff realleges and incorporates the allegation of paragraphs 1 through 25.

27. This claim arises under Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiff's conduct and operation of cable television facilities, including the receiving of microwave and other signals over state lines and the marketing of programs is in interstate commerce and has and will have an impact on interstate commerce. The relevant market consists of the construction and operation of cable television distribution facilities and the provision of cable television services in and about the City of Paragould, Arkansas.

28. Defendant CLW holds a government-created monopoly for the sale of electric service to the City of Paragould. As a part of this monopoly power, Defendant CLW owns the poles necessary for the operation of Paragould Cablevision's cable system. The May 11, 1965 Pole Attachment Agreement between Paragould Cablevision and CLW gives Defendant CLW the discretion to deny any requests of Paragould Cablevision for attachment of its cable and the discretion to terminate the agreement with six months notice. Further, the agreement gives CLW the right to revoke the contract if use of the poles by Paragould Cablevision is forbidden by law or objectionable to any public authority.

29. On information and belief, if a second cable television system were to be constructed by CLW, approximately 80 percent of the poles owned by CLW would

require relocation of cable facilities in order for the second cable television system wire to be strung. On information and belief, the cost of this restringing has not been factored into the financial estimate done by the City for construction of the duplicative cable system. On information and belief, the City is using its leveraging power to impose all or part of the cost of the pole relocations onto Paragould Cablevision.

30. On information and belief, Defendant CLW plans to string its cable along electric lines in violation of the National Electric Safety Code ("NESC") spacing requirements in many instances. These spacing requirements protect both the lives of workers and the general public from potentially dangerous construction and the wires and equipment of others that are installed on the poles. Stringing cable in this manner would place an unfair burden on Paragould Cablevision as a competitor because it jeopardizes the safety of Paragould Cablevision's personnel who repair and readjust its plant on CLW's poles. Such restringing would also endanger the plant itself and impair Paragould Cablevision's ability to compete by subjecting the company to more burdensome and costly standards than those imposed on Defendants' duplicative cable system. Upon information and belief, Defendants intend that Paragould Cablevision will be responsible for absorbing the costs associated with its facilities to enable CLW's cable to be installed in a manner necessary for compliance with relevant code.

31. CLW's power to control the use of the poles, its monopoly power held in the provision of electric service, its new status as a direct competitor with Paragould

Cablevision, and its announced intent to proceed with the construction and operation of a cable television system results in a dangerous probability of success in excluding competition from, and monopolizing, the relevant market.

32. Defendant City granted the November, 1983 franchise under which Paragould Cablevision operates and, as such, is a party to the contract that provides Paragould Cablevision with the right to provide cable television service to Paragould residents for profit. The City possesses the power to regulate Paragould Cablevision's operations, to impose obligations on Paragould Cablevision's business, and to require a franchise fee from Paragould Cablevision. As a direct competitor with Paragould Cablevision, CLW and the City enjoy a dangerous probability of success in excluding competition from, and monopolizing, the relevant market.

33. The conduct of the City and CLW threatens to restrain trade and destroy competition in the relevant market, and constitutes an attempt to monopolize because no other cable television company, including Paragould Cablevision, has or will have the financial ability to provide cable television service to customers in direct competition with a municipality, a government-subsidized utility company and the owner of the poles necessary for provision of cable service. Plaintiff has no adequate remedy at law and is suffering and will, by reason of the conduct of the Defendants, continue to suffer injuries to business, property and future business that cannot be adequately measured or compensated at

law. Plaintiff is entitled to equitable relief and to attorneys' fees and costs.

COUNT II
(Violation of the First and Fourteenth Amendments to the United States Constitution)

34. Plaintiff realleges and incorporates the allegations of paragraphs 1 through 33.

35. Paragraph 2.4 of the franchise agreement between Paragould Cablevision and the City specifies and, on information and belief, has been interpreted by the City to require, that Paragould Cablevision must notify the City, offer its proposed modification to its franchise agreement, and engage in negotiations prior to offering to sell time to advertisers or engaging in other income-producing activities over its cable system.

36. The City has consistently argued that Paragraph 2.4 is a valid and enforceable provision of its franchise agreement with Paragould Cablevision and has insisted that Paragould Cablevision is not permitted to insert advertising on the services transmitted by its cable system without modification of its agreement with the City.

37. The City has indicated that while it may be willing to acquiesce to Paragould Cablevision's request to insert local advertisements, it will do so only if the revenues from such advertisements are included in the franchise feed paid by Paragould Cablevision to the City under Paragraph 5.10 of the franchise agreement between the City and Paragould Cablevision.

38. The January, 1989 franchise agreement between the City and CLW does not contain any similar provision restricting the municipally-owned system's right to engage in income-producing activities such as advertising or requiring notification of CLW's engagement in such activities. On information and belief, the City has not imposed such a restriction on CLW.

39. The City's restriction on Paragould Cablevision's right to sell and transmit advertising on its cable system and its decision not to impose the same restriction on CLW impermissibly favors the rights of certain speakers over others in violation of the First and Fourteenth Amendments of the United States Constitution.

40. The City's imposition of the restriction on advertising on Paragould Cablevision, its failure to impose such a restriction on CLW and its efforts to tie a decision to grant permission to advertise to the amount of franchise fees paid solely by Paragould Cablevision constitutes a discriminatory media tax in violation of the First and Fourteenth Amendments of the United States Constitution. The City's franchise agreement with CLW limits the calculation of the municipally-owned system's franchise fee to revenues generated by basic and pay cable services.

COUNT III
(Breach of Contract)

41. Plaintiff realleges and incorporates the allegations of paragraphs 1 through 40.

42. Paragould Cablevision's franchise with the City, Resolution No. 83-22, is a contract between Paragould Cablevision and the City. Implied in that contract is a duty of good faith and fair dealing and the reasonable expectation that the parties will not do anything to impair the obligations and rights provided in the contract, the parties' performance of the contract, or the parties' enjoyment of the benefits of the contract.

43. The City's conduct in granting a cable television franchise to CLW and in failing to negotiate in good faith with Paragould Cablevision constitutes a willful breach of its contract with Paragould Cablevision by impairing Paragould Cablevision's ability to perform the contract, by obstructing the contract's purposes and performance, by denying Paragould Cablevision the benefits of the contract, and by contravening the City's implied representations to Paragould Cablevision regarding the City's intention to directly or indirectly compete with Paragould Cablevision.

44. By granting CLW a franchise agreement that contains no prohibition of local advertising and by affording CLW a discriminatorily favorable franchise fee, and upon information and belief, and by other acts currently unknown to Plaintiff, City has breached its duty of good faith and fair dealing inherently contained in its franchise agreement with Plaintiff.

NOW WHEREFORE, Plaintiff demands judgment:

1. That Defendants have violated Section 2 of the Sherman Act;

2. That Defendants have violated the First Amendment rights of Plaintiff;

3. That Defendant City has violated its contract with Plaintiff;

4. That Plaintiff is awarded the costs of this action and attorneys' fees;

5. That Defendants are permanently enjoined from constructing and operating a cable television system; from stringing cable wires in violation of NESC rules; and ordered to comply with such other injunctive relief necessary to maintain competition in the relevant market; and

6. That Defendant City has violated Plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution and is permanently enjoined from enforcing Paragraph 2.4 of its franchise agreement with Paragould Cablevision.

7. That such other relief be granted that the Court shall deem appropriate.

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No. 91-469

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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IN THE

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PARAGOULD CABLEVISION, INC.,
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PETITIONER'S REPLY BRIEF

Petitioner Paragould Cablevision, Inc. ("Cablevision") submits this reply brief in support of its Petition for a Writ of Certiorari. In its Petition, Cablevision set forth important and recurring questions regarding the anti-trust exemption for municipally-owned competitors and regarding the standards for waivers of First Amendment rights in franchising contexts. The troubling implications and precedental impact of the Eighth Circuit's opinion were underscored and analyzed by the three briefs *amicus curiae* filed in support of the petition.[1] The basic

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[1] Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* for the National Cable Television Association, Inc. in Support of Petitioner ("NCTA Br."); Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc., and Comcast Cable Communications, Inc. in Support of Petitioner ("TCI

thrust of the briefs in opposition [2] is to attempt, through hyperbole and mischaracterizations of Cablevision's claims and the court of appeals' ruling, to camouflage the Eighth Circuit's erroneous legal and policy positions. Once the underbrush strewn by respondents is swept away, what remains is a decision that presents questions of broad importance meriting review by this Court.

I. THE ANTITRUST QUESTIONS WARRANT PLENARY REVIEW

Starting with *City of Lafayette* in 1978, this Court has attempted to establish in four cases the extent to which municipalities should be provided antitrust immunity under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).[3] The Eighth Circuit's decision here highlights the necessity of the Court's squarely addressing the issue expressly left open last Term in *City of Columbia*—the immunity status of conduct by a municipally-owned marketplace competitor.

Cablevision and the amici supporting it contend that the federalism policies underlying the *Parker* doctrine would not be undermined, and the consumer welfare objectives underlying the antitrust laws would be advanced, by requiring government-owned market participants to

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Br."); Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Warner Cable Communications, Inc. in Support of Petitioner ("Warner Br.").

[2] Brief in Opposition for Respondent City of Paragould (hereafter "City Br."); Brief in Opposition by Respondent Paragould Light and Water Commission (hereafter "CLW Br.").

[3] *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S. Ct. 1344 (1991).

comply with the same competitive safeguards as their competitors.[4]

From the perspective of federalism, the *Parker* state action doctrine was developed primarily to protect the actions of "States in their governmental capacities as sovereign regulators." *City of Columbia*, 111 S. Ct. at 1351. A government entity acting as a full marketplace competitor presents a very different situation. "It is thus a familiar concept that 'there is a constitutional line between the State as government and the State as trader.' " *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696 (1976) (citation omitted). *See also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (governmental-proprietary distinction for Commerce Clause analysis). To apply this distinction to municipally-owned enterprises, when municipalities hold no special place in our federal scheme, is particularly appropriate.

From the antitrust perspective, this Court recognized in *City of Lafayette* that unfettered economic choices by municipalities "counseled solely by their own parochial interests and without regard to their anticompetitive effects" could seriously damage the antitrust protection established by Congress. 435 U.S. at 408. Perhaps for such reasons, this Court has applied the Robinson-Patman Act to state proprietary activities, *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, 460 U.S. 150 (1983), and has applied the competitive protections of the Elkins Act to municipal proprietary conduct, *Union Pacific R.R. Co. v. United States*, 313 U.S. 450 (1941). To put it bluntly, it is equally appropriate to

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[4] This case squarely presents the issue left open in *City of Columbia*, as it challenges the marketplace conduct of its municipal competitor, not the actions for antitrust purposes of the municipal government as sovereign. *Compare Allright Colorado, Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir. 1991), *petition for cert. filed*, No. 91-572 (Sept. 30, 1991) (antitrust challenge to municipal regulations when city owned competing off-airport-shuttle parking services).

subject the conduct of CLW in Paragould to antitrust scrutiny as it is to test the conduct of nonprofit entities such as the Sisters of St. Joseph of Carondelet in Augusta, Georgia. *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

Amici NCTA proposes as a rule of decision that this Court should require express state authorization for anticompetitive practices engaged in by a municipal market participant. (NCTA Br. at 8.) Such a rule would certainly have prevented the Eighth Circuit's mistaken application of the standards found in *Town of Hallie* to conclude that in authorizing municipal entry into cable television the Arkansas legislature contemplated anticompetitive marketplace conduct by such entrants. That the court of appeals reached its ruling despite federal cable policy to promote competition in cable communications [5] and on the basis that the Arkansas legislature contemplated local governments ousting First Amendment speakers through anticompetitive means as a natural consequence of authorizing entry [6] further underscores the need for this Court to take action.

Respondent CLW insists that the court of appeals' decision is not so disturbingly broad and that the Eighth Circuit only upheld entry itself from antitrust scrutiny. (CLW Br. at 10-18.) Cablevision would like to believe that CLW is, in fact, right on this point, but CLW's argument is belied both by the court of appeals' holding —"the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies" (Pet. App. 6a)—and by its judgment. Cablevision's complaint was dismissed with prejudice, with no opportunity to amend.

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[5] 47 U.S.C. § 521(6) (1988); *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (July 31, 1990).

[6] *See* Petition at 20-21.

Such a judgment is appropriate only if the court concludes "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *Baxley-DeLamar Monuments, Inc.* v. *American Cemetery Ass'n*, 843 F.2d 1154 (8th Cir. 1988). In contrast to CLW, according to the City of Paragould, the gist of the court's opinion is that "the Sherman Act simply has no application." (City Br. at 9.)

CLW also attempts to deflect Cablevision's petition by claiming that its Complaint was filed prematurely and was designed to crush, not preserve competition. (CLW Br. at 7, 17.) The fact of the matter is that under the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), municipalities are immune from treble damage actions, remaining subject only to injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1988). Under Section 16, injunctive relief is available where injury is merely threatened; it is not necessary that actual antitrust injury have already occurred. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (antitrust plaintiff seeking injunctive relief "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur"); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982). Furthermore, an attempt to monopolize claim under section 2 of the Sherman Act does not require that monopolization of the market has already taken place. It is sufficient to allege that there is a dangerous probability of success in achieving prohibited anticompetitive effects. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *H.L.*

Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1017 (2d Cir. 1989); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1540-41 (8th Cir. 1989); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989). For Cablevision to await further injury before initiating litigation might have permitted a court to conduct a thorough historical autopsy of how competition was eliminated, but left that court helpless to preserve consumer welfare or Cablevision as an independent competitor and First Amendment voice in Paragould.[7]

II. THE FIRST AMENDMENT WAIVER QUESTION WARRANTS PLENARY REVIEW

Under the Cable Act of 1984, a cable operator must apply for and obtain a franchise from the local franchise authority in order to provide cable service. 47 U.S.C. § 541(b) (1988). While recognizing that Cablevision had expressed a valid First Amendment claim because its franchise required it to solicit the City's permission to engage in commercial speech, the Eighth Circuit held that "Cablevision effectively bargained away some of its free speech rights" by entering into a franchise agreement. (Pet. App. 8a.) The three amici briefs provide eloquent testimony that the implications of this cavalier finding of waiver in the franchising context go far beyond the burdening of Cablevision's rights in Paragould and that the Eighth Circuit's decision is fundamentally inconsistent with this Court's jurisprudence.[8]

CLW's claim that Cablevision lost its right to challenge on constitutional grounds the advertising provision by

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[7] Certainly if the Eighth Circuit were reversed, Cablevision would amend the complaint, pursuant to Fed. R. Civ. P. 15, to allege the predatory, anticompetitive and coercive conduct by the City and CLW that has been occurring, an opportunity that was denied by the court's judgment below.

[8] *See* NCTA Br. at 13-18; TCI Br. at 15-20; Warner Br. at 12-19.

failing to raise the objection at a proper time is absurd. CLW argues that any objections should have been raised at the time the contract was entered into. The case upon which CLW relies, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), concerned the failure to make a constitutional argument at a timely point in the litigation process, namely, at trial. It did not impose any duty to make constitutional objections outside a litigation context. Here, Cablevision has raised its First Amendment argument at every step in the litigation process, beginning with its Complaint. (CLW Br. App. 10a.) Hence, *Curtis* provides no support for CLW's position.[9]

Even if *Curtis* could be read to apply outside a litigation context, it still would not support CLW's claim that a mere failure to raise an objection waives it. *Curtis* held that a failure to object would amount to a waiver only if "clear and compelling" circumstances showed it to be a "knowing waiver." *Curtis*, 388 U.S. at 143-145. Applying this standard in *Curtis*, the Court found no waiver, even though the constitutional argument was not raised until after trial. *Id.* at 142-145. Under applicable law, the facts of each case must be carefully examined in order to determine whether or not a waiver of constitutional rights has taken place. (Pet. at 22.) CLW makes the same error as did the court of appeals by asserting waiver without any analysis.

As the amici make clear, the potentially far-reaching consequences of the court of appeals' decision on the cable industry are enormous. Under the logic of the court of appeals' decision, a municipality could require a cable operator to bargain away in the franchising process any

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[9] In any event, Cablevision could not raise an objection to discriminatory tax treatment at the time the franchise was negotiated or signed as no other cable system operated in Paragould at that time. Contrary to CLW's assertion (CLW Br. at 19 n.15), only its revenues derived from the sale of cable services, and not advertising revenues, are included in CLW's franchise fees.

or all of its First Amendment rights recognized by the Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). Such a result is such a radical departure from this Court's jurisprudence that it should be reviewed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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